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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MARYLAND AND VIRGINIA MILK PRODUCERS COOPERATIVE ASSOCIATION, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

No rule of criminal antitrust law is more Draconian or oppressive than the "*vicarious liability rule*". That rule imposes strict criminal liability on a corporate employer for a lower level employee's violation of the Sherman Act, albeit the employee acted without the corporation's knowledge, authorization or approval, and even contrary to its instructions. It is thus difficult for a corporation successfully to defend itself in any vicarious liability case, even when the employee is still employed and accessible. Here, petitioner's plight was far worse: The employee was discharged several years before the corporation was indicted for the employee's alleged antitrust offense; the employee was hostile; indeed, he had an "axe to grind" for the earlier unrelated discharge.

This case thus comes before this Court on constitutional grounds, and because the lower courts failed correctly to apply governing decisions of this Court. As demonstrated *infra*, the prosecutors took unjust advantage of petitioner's aforesaid vicarious liability predicament and methodically deprived the corporation of a fair trial in violation of the Fifth and Sixth Amendments. This case thus presents the following questions:

1. Did the prosecutors' extraordinarily lengthy preindictment delay, which was exceedingly prejudicial to petitioner under the vicarious liability rule, deprive petitioner of due process of law in violation of the Fifth Amendment?

2. Did the prosecutors unconstitutionally deprive petitioner of a fair trial in this vicarious

liability case by (i) foreclosing all pretrial access to the employee who allegedly committed the crime, (ii)suppressing evidence of conflicting statements the employee made regarding his and petitioner's innocence or guilt, and (iii) suppressing, *until after petitioner was convicted*, evidence that the employee had a personal stake in the outcome of this case, and that he originally volunteered other baseless criminal charges against petitioner which the prosecutors were totally unable to support or sustain (*Pet.App.* 62-64a)?

3. Did the district court fail to follow—and did the Fourth Circuit misapply—the Jencks Act and this Court's decision in *Goldberg v. United States*?

4. A. Did the district court and the Fourth Circuit erroneously fail to dismiss the indictment under the five-year statute of limitations and this Court's decision in *Grunewald v. United States*?

B. Did the district court and the Fourth Circuit erroneously fail to dismiss the two mail fraud counts under this Court's decision in *McNally v. United States*?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Maryland and Virginia Milk Producers Cooperative Association, Inc. respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is in petitioner's appendix (*Pet.App.* 1-36a).[2] An order amending that opinion is printed at *Pet.App.* 38-39a. Opinions issued by the United States District Court for the Eastern District of Virginia, Norfolk Division, denying petitioner's motions to dismiss the indictment and for a new trial are printed in petitioner's appendix at pp. 44-57a. The district court's judgment of conviction is printed in petitioner's appendix at pp. 57-58a.

JURISDICTION

The Court of Appeals entered judgment on September 15, 1992 and denied petitioner's petition for rehearing on October 6, 1992 (*Pet.App.* 37a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes, the pertinent text of which is set forth in *Pet.App.* at pp. 59-62a, are involved in this case:

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[1] Petitioner, an incorporated farmer's cooperative, has no parent company or subsidiary companies to report pursuant to Supreme Court Rule 29.1.

[2] "*Pet.App.*" references are to the appendix to this petition.

The Fifth and Sixth Amendments to the Constitution of the United States.

The Sherman Act, 15 U.S.C. § 1.

The Mail Fraud Statute, 18 U.S.C. § 1341.

The Statute of Limitations, 18 U.S.C. § 3282.

The Jencks Act, 18 U.S.C. § 3500(b)-(e)

STATEMENT OF THE CASE

1. Petitioner Was Deprived Of Due Process And A Fair Trial In This Criminal Antitrust Case Under The Vicarious Liability Rule

This case presents important questions of constitutional and federal statutory law applicable to criminal prosecutions wherein the United States indicts corporate employers under the so-called *"vicarious liability rule"* for criminal offenses allegedly committed by lower level corporate employees. Here, petitioner—an incorporated farmers' cooperative—was vicariously indicted in 1991 for a violation of the Sherman Act allegedly committed in 1984 by an employee it discharged for other reasons in 1986.

When a corporation is vicariously indicted for a crime allegedly committed by an individual no longer employed by the corporation, the corporation is like a rudderless ship foundering in a stormy sea. Here, the corporation had no access whatever to the discharged employee for whose alleged seven-year old crime it was indicted. No officer or director of the corporation authorized the alleged Sherman Act violation, and bid-rigging was prohibited by the corporation's policies and instructions to employees. Thus, the corporation had no knowledge or information about the alleged offense. Moreover, when the employee left in 1986, he took his personal work papers with him, and the cooperative had long ago innocently discarded old, irreplace-

able run-of-the mill bid documents which suddenly became so vitally important in 1991 (JA 56-80).[3]

Furthermore, the "*vicarious liability rule*," which constitutes the basis for petitioner's criminal liability in this case, is exceedingly Draconian and oppressive. Initially, legal commentators forcefully argued that it was inappropriate and unjust for the government to impose criminal liability on a corporation for completely unauthorized criminal offenses committed by individual employees. See *United States v. Hilton Hotels Corporation*, 467 F.2d 1000, 1006 (9th Cir. 1972), *cert. denied* 409 U.S. 1125 (1973). However, this Court ruled that Congress may constitutionally impose criminal liability on business entities such as corporations and partnerships for crimes committed by employees within the scope of their employment. See *New York Central and Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909); *United States v. A&P Trucking Co.*, 358 U.S. 121, 125-26 (1958).

Accordingly, in recent years the government has repeatedly utilized the "vicarious liability rule" in an increasingly oppressive manner to prosecute corporate employers for Sherman Act antitrust violations allegedly committed by lower level corporate employees. See *United States v. American Radiator & Stand. San. Corp.*, 433 F.2d 174, 204-05 (3rd Cir. 1970), *cert. denied* 401 U.S. 948 (1971); *United States v. Hilton Hotels Corporation*, *supra*, at 467 F.2d 1004-07; *United States v. Koppers Co. Inc.*, 652 F.2d 290, 298-99 (2d. Cir. 1981), *cert. denied* 454 U.S. 1083 (1981); and *United States v. Basic Construction Co.*, 711 F.2d 570 (4th Cir. 1983), *cert. denied* 104 S.Ct. 371 (1983). Under this line of decisions, corporations have been held criminally liable for violations of the Sherman Act committed by lower level employees, albeit the employees acted totally without the knowledge or authori-

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[3] References to "JA" are to the Joint Appendix in the court of appeals.

zation of stockholders, directors or top management officials, and even in cases where such violations were prohibited by the corporations' policies or instructions. See *Basic Construction Co.*, *supra*, at 711 F.2d 572-73.

In this case, therefore, petitioner recognized from the very outset that its ability to defend itself against the indictment depended almost entirely on its capacity somehow to gain access to and information from the discharged employee for whose alleged seven-year old Sherman Act violation petitioner was vicariously indicted. However, the discharged employee was extremely uncooperative and he flatly refused to discuss any aspect of the indictment with petitioner or its counsel. Petitioner's only alternative, therefore, was to seek whatever information the prosecutors might fairly divulge to clarify why the corporation was indicted in 1991 for an alleged school milk supply contract bid-rigging offense committed by the disgruntled employee in 1984, prior to his discharge in 1986.

Prosecutors, of course, are representatives of the sovereign whose interest in a criminal prosecution is *not* that the government must win the case, but that justice shall be done. See *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985); *Berger v. United States*, 295 U.S. 78, 88 (1935). "Society wins not only when the guilty are convicted but when criminal trials are fair." See *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In this case, however, the prosecutors—apparently aware of petitioner's predicament under the vicarious liability rule—literally did everything in their power to deprive petitioner of due process of law and a fair trial in violation of the Fifth and Sixth Amendments:

First, the prosecutors subjected petitioner to more than *seven years* of wholly unnecessary *preindictment delay*, during which period petitioner lost the discharged employee for whose alleged "ancient" crime the corporation

was indicted, plus crucial, irreplaceable documentary evidence as well (JA 56-80).

Second, the prosecutors unjustly manipulated the discharged employee for the purpose of keeping petitioner and its counsel "in the dark" regarding the nature of his testimony until the trial. Although he was ultimately their key witness against petitioner, the prosecutors withheld him from any appearance before the grand jury. Hence, when petitioner moved for "pre-trial production of statements of government witnesses", the prosecutors had no grand jury testimony of the discharged employee to produce (JA 20-21; 33).

Third, when petitioner moved for production of all "Brady Material", in line with this Court's decision in *Brady v. Maryland*, *supra*, and its progeny, the prosecutors misled petitioner and its counsel by producing *only* a snippet of *exculpatory evidence* which they summarized as follows (*Pet.App.* 66-69a):

> "During an interview with Department of Justice attorneys, an agent from the Naval Investigative Service and an agent from the Defense Criminal Investigative Service on April 2, 1987 . . . Charles Elliott [the discharged employee] stated that he had no basis to believe there had been collusion on school bids [the Sherman Act violation for which petitioner was indicted in 1991]."

Fourth, when counsel for petitioner thereupon filed an "Emergency Motion To Compel Production" of any additional statements the discharged employee may have made, the prosecutors again misled petitioner before the district court by stating the discharged employee might not even be called as a witness for the government at trial (JA 46).

Fifth, the district court suggested, however, that it might still be appropriate for petitioner to take the discharged

employee's deposition.[4] Petitioner thus immediately served a notice of deposition and *subpoena duces tecum* on the discharged employee. The prosecutors frantically responded by moving to quash the subpoena, and the district court, which suggested the deposition in the first place, now summarily granted the prosecutors' motion (JA 47-55; 81C-D).

Sixth, when the trial commenced shortly thereafter in September, 1991, the true extent of the prosecutors' pretrial deception immediately became clear. *The prosecutors promptly called the discharged employee to testify as their main witness against petitioner* (JA 287-442). The employee testified that, after the aforesaid initial interrogation in 1987, he returned for further interrogation in 1991. At that time, *he received several successive grants of immunity from personal prosecution, and federal agents and prosecutors interrogated him for more than 90 hours on at least 13 different occasions* (JA 372-78). *In any event, the discharged employee finally told a diametrically different story in 1991 than the prosecutors' Brady snippet states he told in 1987.* And, of course, the diametrically different story he told in 1991 exposed petitioner to vicarious criminal liability for the Sherman Act offense he alleged he committed in 1984, shortly after he was employed by petitioner.

Seventh, confronted at the trial with this surprise testimony by the discharged employee as a witness for the government, petitioner immediately moved for an order directing the prosecutors to produce all statements made by the discharged employee in 1987 and 1991 which related to his testimony at the trial. Petitioner's counsel stressed that the prosecutors' suppression of these statements violated petitioner's rights under the Fifth and Sixth Amend-

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[4] Rule 15, F.R.Cr.P., provides that depositions may be taken in criminal cases when "due to exceptional circumstances . . ., it is in the interest of justice."

ments, and prevented fair, effective cross-examination of the employee for whose alleged crime petitioner was on trial (JA 491-92). The prosecutors objected, and again the district court refused to order production of the statements, even for *in camera* review (JA 491). Consequently, throughout the trial, the prosecutors were allowed *to suppress* vitally important *exculpatory, impeachment* and *credibility evidence* contained in diametrically conflicting statements made by the discharged employee to federal agents and prosecutors in 1987 and 1991.

Eighth, after petitioner was convicted and filed a motion for a new trial, the district court—apparently troubled by its failure to order the prosecutors at least to produce the aforesaid statements for *in camera* review—conducted an *ex parte* review the statemnts (without any notice to petitioner or its counsel) for the limited purpose of determining whether the discharged employee had been "coached" by the prosecutors (JA 776).

Ninth, finally *after* petitioner was convicted and *after* it had appealed to the Fourth Circuit, the prosecutors proposed to call the discharged employee (Elliott) as a government witness in another closely-related case (*United States v. Hughes*, Cr. No. 92-25-N, E.D. Va, Norfolk Div.).[5] *Unlike the district judge in this case, the trial judge in Hughes immediately ordered the prosecutors to produce both their notes covering Elliott's interrogation statements, and any other related exculpatory, impeachment or credibility evidence in their possession.* In addition to their notes,the prosecutors thereupon produced, *inter alia*, an official Department of Justice memorandum they had prepared for their supervisors in the Antitrust Division (See *Pet.App.*

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[5] The defendant in *Hughes* was *acquitted* by a jury of perjury and alleged obstruction of justice charges related to the prosecutors' 1987 investigation, during which the discharged employee was interrogated as stated hereinabove.

pp. 63-65a). That memorandum, *suppressed throughout the trial in this case*, disclosed (*Pet.App.* pp. 63-65a):

1. That the discharged employee (Elliott), had an important personal stake in the outcome of this case—to wit, he had a grudge or "an axe to grind" against both petitioner and a former fellow employee, Mr. Neale, for his discharge in 1986; and

2. That accordingly, in 1987, he appeared before the prosecutors and "*proffered*" a series of other criminal allegations against petitioner and Mr. Neale in an effort to gain their indictment at that time. However, the prosecutors vigorously investigated the disgruntled employee's charges and found them to be *unsupportable* and *unsustainable* (*Pet.App.* pp. 64-65a).

* * *

In addition to violating petitioner's constitutional right to a fair trial and due process of law in this case, the lower courts erroneously failed to dismiss the indictment, including the two mail fraud counts, under this Court's decisions in *Grunewald v. United States*, 353 U.S. 391 (1951) and *McNally v. United States*, 483 U.S. 350 (1987). The lower courts also misread and misapplied the Jencks Act and this Court's decision in *Goldberg v. United States*, 425 U.S. 94 (1976).

As a result, petitioner was unfairly convicted for crimes allegedly committed by the discharged employee prior to his discharge in 1986; fined $1,100,600; automatically suspended, with a multi-million dollar loss of sales, from business as a federal milk supply contractor; and immediately exposed to a follow-on, treble damage civil antitrust suit filed by the Commonwealth of Virginia.

2. Factual Background

Briefly summarized, this is the factual background in which this vicarious liability case arose:

Petitioner Maryland and Virginia Milk Producers Cooperative Association, Inc. is a nonprofit, non-stock membership agricultural cooperative (JA 728). Incorporated in 1920 under the laws of Maryland, its conviction in this case is its first for any criminal offense (JA 719). The cooperative is owned and operated by approximately 1,400 dairy farmers who produce milk on farms located in Maryland, Virginia, West Virginia, Pennsylvania and Delaware. The Cooperative is managed by a board of directors which consists entirely of dairy farmers elected to represent various membership districts located in the five-state area (JA 728). The cooperative's principal mission is to sell raw milk produced by its member farmers. It does this through its Marketing Division in Reston, Virginia. In 1962, however, the cooperative built Marva Maid Dairy (Marva Maid) in Newport News, Virginia. Marva Maid is the only modern, automated dairy built in the Tidewater area of Virginia in more than 50 years (JA 729). Since it became operational thirty years ago, Marva Maid consistently competed for commercial, military and school sales in Virginia (JA 729). Its school sales, however, were never a significant part of its business—they accounted for only about 5% of the dairy's total sales. In addition, profits on school sales were always relatively minuscule, so Marva Maid concentrated on commercial and military sales which are more profitable (JA 508, 512).

Nevertheless, the indictment charges that the cooperative violated the Sherman Act by allegedly engaging in a combination or conspiracy to rig bids for school milk contracts (JA 8). The indictment also contains two technical mail fraud counts. The cooperative's alleged criminal liability is *vicarious* only. The cooperative has been indicted and convicted for violations of the Sherman Act and the mail fraud statute allegedly committed by a former employee, Charles Elliott, prior to his discharge for completely unrelated reasons in 1986.

Prior to his employment by the cooperative in September, 1983, Elliott was employed by Pet, Incorporated in South Carolina. When Mr. Neale, who managed Marva Maid for more than twenty years, reached retirement age, Elliott was employed to succeed him (JA 291). After a training period, Elliott assumed his new position as manager of Marva Maid on April 1, 1984 (JA 562).

According to testimony produced by the government at trial, Elliott's transfer from Pet to Marva Maid alarmed Mr. Altaffer, manager of Pet's dairy in Virginia, and his assistant, Mr. Stamper (JA 217-18; 448). They were concerned because Elliott, a former Pet employee, "knew too much about [their] business" (JA 448). They felt Elliott would be "very aggressive", and that he might try to capture some of their customers (JA 218, 448-49). Accordingly, Stamper testified Altaffer instructed him to meet with Elliott "to get his philosophy"—"to determine his interests in the marketplace" (JA 141-42). The indictment charges that the initial 1984 meeting was followed by two additional meetings, one in 1985 and another in 1986, simply to reconfirm the 1984 discussion (JA 9). Elliott, however, testified he could only recall meeting "*twice*"—once in 1984 and again in 1985 (JA 310, 339). In any event, as stated above, Elliott was removed from his position in May, 1986 for unrelated mismanagement of the cooperative's dairy (JA 350-54; 409-15).

Elliott testified at the trial that, when he attended the 1984 meeting with his former employer, Pet, he had no knowledge of, or prior experience with, school bids in Virginia. His specialty at Pet, and initially at Marva Maid, was commercial supermarket sales (JA 317). Thus, he testified he made it clear to Pet that he did not even know where the various school systems were located, how many schools there were, and which dairies served which schools (JA 317-20). Elliott stated, however, that the discussion centered on the desirability of Pet and Marva Maid not aggressively and destructively seeking to oust each other

from the school systems the two dairies had historically served, with one exception: Marva Maid, which was then serving far less than the 90 or more schools served by Pet, would, with Pet's acquiescence, bid more aggressively to win the Williamsburg/James City school milk contract, since those schools were located nearer to Marva Maid's dairy in Newport News than to Pet's dairy in Portsmouth (JA 319-21; 451-56).

According to the government's evidence, there was *no* agreement to increase milk prices for the schools or school children, or profits for either Pet or Marva Maid (JA 421). In fact, Marva Maid's profits on the contract Elliott subsequently won to serve seven additional schools in the Williamsburg/James City area were truly *de minimis* (JA 731):

1984-85	$7,869.00
1985-86	7,398.00
1986-87	3,503.00.

The evidence at the trial established further that, during the indictment period, Marva Maid's bid prices for the half pints of milk it sold to the seven Williamsburg/James City schools actually *declined* after the 1984 meeting (JA 862-63):[6]

	1983	1984	1985	1986
Low-fat White Milk	15.65¢	14.59¢	14.49¢	14.05¢
Low-fat Chocolate Milk	15.95¢	13.73¢	13.65¢	13.65¢

Finally, evidence at the trial established that, under the Virginia Milk Commission law, (Va.Code, § 3.1-425), price competition among competing dairies is pervasively regulated by the Virginia Milk Commission. Dairies like Pet and Marva Maid must pay *identical* prices for their raw

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[6] The 1983 bids were *before* Elliott succeeded Neale at Marva Maid and before Elliott's alleged 1984 meeting with his former employer, Pet.

milk supplies, and no dairy may sell processed milk to Virginia schools below cost (JA 543). The Commission audits the dairies each year, and any dairy found violating the statute or regulations may be closed or otherwise penalized (JA 551, 555). At the trial, the Administrator of the Commission testified that, based on Commission experience with Marva Maid, its profits on school milk sales, both before, during and after 1984, were always "razor thin" (JA 526).

3. Proceedings Below

Petitioner was indicted on July 30, 1991 and convicted on September 27, 1991 after a five-day trial in the United States District Court for the Eastern District of Virginia, Norfolk Division. Petitioner's motion for a new trial was denied and petitioner was sentenced on November 12, 1991. Petitioner thereupon appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the conviction on September 15, 1992 (*Pet.App.* 1a). A petition for rehearing was denied on October 6, 1992 (*Pet.App.* 37a).

The district court's jurisdiction was based on the Sherman Act, 15 U.S.C. § 1; the mail fraud statute, 18 U.S.C. § 1341, and the false statements statute, 18 U.S.C. § 1001. The false statements count of the indictment was dismissed by the district court.

REASONS FOR GRANTING THE WRIT

1. This Court Should Review This Case And Reestablish The Constitutional Right Of Corporate Employers To Due Process Of Law And A Fair Trial In Sherman Act Criminal Prosecutions Under The Vicarious Liability Rule.

Unless this Court reviews this case and reestablishes appropriate constitutional protections, any corporate employer in the United States is a potential victim of the

type of totally unjust criminal prosecution the government inflicted on petitioner in this case under the Draconian *vicarious liability rule*. As demonstrated *supra*, under that stringent rule, any corporation is criminally liable for a violation of the Sherman Act committed by a lower level employee within the scope of his employment, albeit that violation was committed without the knowledge, authorization or approval of the corporation and completely contrary to the corporation's policies and instructions. See *New York Central & Hudson River R.R. Co. v. United States*, *supra*; *United States v. A&P Trucking Co.*, *supra*, at 358 U.S. 125-26; *United States v. Basic Construction Co.*, *supra*, at 711 F.2d 572-73; *United States v. Koppers Co., Inc.*, *supra*, at 652 F.2d 298-99; *United States v. Hilton Hotels Corporation*, *supra*, at 467 F.2d 1004-07; *United States v. American Radiator Stand. San. Corp.*, *supra*, at 433 F.2d 204-05.

If the Fourth Circuit's decision is allowed to stand, the government will be licensed to continue to deprive corporate employers of due process of law under the Fifth Amendment by subjecting them—after lengthy periods of extraordinary preindictment delay—to criminal liability under the vicarious liability rule for Sherman Act and mail fraud violations allegedly committed by *former employees*, who are completely inaccessible to the employers, and after the employers have also lost irreplaceable documentary evidence essential to their defense. In addition, the government will remain free to strip corporate employers of their constitutional right to a fair trial under the Fifth and Sixth Amendments by systematically suppressing *exculpatory*, *impeachment* and *credibility* evidence in its possession regarding either the inaccessible former employee, who allegedly committed the crime charged against the corporation, or the alleged crime itself.

A. *Unconstitutional Preindictment Delay*—In *United States v. Lovasco*, 431 U.S. 783, 784 (1977), this Court ruled that "preindictment delay" is "the time between the

commission of the offense and the institution of the prosecution". In this case, the district court and the Fourth Circuit failed to measure the length of the delay here involved, as defined by *Lovasco*. Accordingly, they missed the critical point from the very outset: Here, the discharged employee allegedly committed the basic Sherman Act offense in the Spring of 1984, but petitioner was not indicted until July 30, 1991—i.e. after preindictment delay of *more than seven years*. Indeed, the government waited *longer than five years* after the employee was removed from his position of employment in May, 1986 to indict petitioner in 1991 for the former employee's alleged crime.

In *United States v. Marion*, 404 U.S. 307, 324 (1971), a case involving three years of delay (which three Justices said was "at the edge of permissible delay" See 404 U.S. 335), this Court ruled that "the statute of limitations does *not* fully define the [defendant's] rights with respect to events occurring *prior* to the indictment". *The government thereupon conceded "that the Due Process Clause of the Fifth Amendment requires dismissal of an indictment where it is shown that the delay caused substantial prejudice to a defendant's right to a fair trial."* But, throughout this case, both the district court and the Fourth Circuit still insisted that "the proper guide here is to ensure that the indictment is in place *within the statute of limitations*" (*Pet.App.* 13a; 46a).

In *United States v. Lovasco*, *supra*, at 431 U.S. 790, a case involving only 18 months of preindictment delay, this Court added a requirement that "the [preindictment delay] due process inquiry must [also] consider the reasons for the delay as well as the prejudice to the accused". This Court stated that courts must then determine whether the preindictment delay "violates fundamental conceptions of justice which lie at the base of our civil and political institutions", or "offends . . . the community's sense of fair play".

In this case, therefore, petitioner—confronted in 1991 with vicarious criminal liability for a seven-year old crime allegedly committed by an employee it discharged in 1986 and to whom it had no access whatsoever—moved to dismiss the indictment for the government's unconstitutional preindictment delay (JA 56-80). Adhering to the requirements of this Court's decisions in *Marion* and *Lovasco*, and of subsequent lower court decisions in *Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990), *cert. denied* 111 S.Ct. 590 (1990); *United States v. Sample*, 565 F.Supp. 1166 (E.D. Va. 1983) and *United States v. Richburg*, 478 F.Supp. 535 (M.D. Tenn. 1978), petitioner supported its motion to dismiss with a series of sworn affidavits which detailed the nature of the *severe prejudice* petitioner suffered in this vicarious liability case as a result of the government's extraordinarily lengthy preindictment delay (JA 56-80). Those affidavits established, without contradiction from the government, that, during the long preindictment delay, petitioner suffered (1) the loss, in 1986, of the discharged employee for whose alleged crimes it was indicted, (2) the loss, in 1986, of the discharged employee's personal work papers, bid documents, bid computations, correspondence and memoranda, and (3) the loss, after early 1988, of other crucially important, irreplaceable bid documents which petitioner previously made available to the government during the aforesaid 1986-88 antitrust investigation (JA 56-80).

The district court summarily denied the motion to dismiss without even holding an evidentiary hearing (*Pet.App.* 45-46a). The Fourth Circuit thereafter erroneously ruled: "We find the prejudice here is slight and does not rise to constitutional dimension" (*Pet.App.* 12a). But, in *Howell v. Barker*, *supra*, under compelling circumstances akin to those confronting petitioner in this vicarious liability case, the court of appeals stated: "[A]ctual prejudice is assumed and conceded". See 904 F.2d 895. In *United States v. Richburg*, *supra*, the indictment was dismissed for only 32-

months of preindictment delay, during which time important defense documents were discarded. And in *United States v. Sample*, *supra*, the delay was only 24 months, but the indictment was dismissed because a defense witness died and another lost his memory. Here petitioner lost both the discharged employee and crucial, irreplaceable defense documents.

The Fourth Circuit also erroneously suggested that petitioner's loss of the discharged employee was not prejudicial because petitioner had the opportunity to cross-examine him when the government produced him as a witness at the trial (*Pet.App.* 12a). But, evidence in this case shows that Elliott was a *surprise government witness* at the trial, and he was *hostile* to petitioner for his 1986 discharge. *In any event, complete denial of access to him after his discharge deprived petitioner of any opportunity to prepare for his cross-examination at trial; and petitioner—charged with his alleged crimes—had no opportunity to determine from him whether, for some reason, he (Elliott) might advantageously be called as a witness for petitioner.* In a case under the Draconian vicarious liability rule, a defendant should not have to remain in the dark until the trial commences and its former employee is produced as its main adversary in court.

Finally, the Fourth Circuit erred by holding that prejudice resulting from the loss of the discharged employee's bid files was "minute" (*Pet.App.* 12a). The bid files petitioner lost were *the discharged employee's personal bid records, computations, work sheets, correspondence and memoranda.* Without the employee himself *and without his personal bid files*, the corporate employer in this vicarious liability case was left defenseless. Indeed, the federal prosecutors in this case recently conceded, in a related case (*United States v. Hughes*, *supra*): Such bid files are "the primary tools" in "an antitrust investigation". They constitute "*evidence of the crime itself*", or they can *exonerate the defendant.* They "contain a great deal of evidence"

(*Pet.App.* 77a). And, of course, the discharged employee's *personal* bid files could not be obtained from any other source, as the Fourth Circuit baselessly suggested (*Pet.App.* 12a).

Moreover, the record here is clear that the extraordinary preindictment delay in this case was *not "investigative delay"*. See *Lovasco*, at 431 U.S. 786. In January, 1988, the prosecutors closed their initial investigation, stating: "*[W]e have no proof of bid rigging or any other antitrust violations.*" (*Pet.App.* 65a). They thereupon closed the investigation and did not reopen it for another 3 years (in 1991). In *United States v. Sample* and *United States v. Richburg* it was held that *when the government "places defendants on the back burner for . . . years while [it] pursues more pressing matters"*, that period of inactivity is *not* "investigative delay". See 478 F.Supp. 545; 565 F.Supp. 1183. On the contrary, that type of delay is *"preindictment delay"* which denies due process and violates fundamental conceptions of justice and fair play—especially in cases under the "vicarious liability rule" where corporate employers are forced to defend themselves against unauthorized "ancient" crimes allegedly committed by former, discharged employees.

Finally, the Fourth Circuit's holding in this case that preindictment delay does not result in a due process violation *"in the absence of . . . evidence that the government intentionally delayed to seek a tactical advantage"* (*Pet.App.* 14a), clashes head-on with the Fourth Circuit's own recent decision in *Howell v. Barker*, at 904 F.2d 895. There, the Fourth Circuit ruled: "*. . . [W]e cannot agree . . . that a defendant, in addition to establishing prejudice, must also prove improper prosecutorial motive before seeking a due process violation.*" This inexplicable conflict within the same circuit, we respectfully submit, emphasizes how truly erroneous the Fourth Circuit's decision in this case really is.

2. This Court's Review Is Essential In This Vicarious Liability Case Because The Prosecutors Suppressed Both The Discharged Employee And Vitally Important Impeachment Evidence In Violation Of The Fifth and Sixth Amendments.

It is settled, of course, that "suppression by the prosecution of evidence favorable to the accused upon request violates due process . . ., irrespective of the good faith or bad faith of the prosecution." See *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly". *Brady*, at p. 87. Obviously, this does not mean that a prosecutor is required to deliver his *entire file* to defense counsel, as the Fourth Circuit suggested (*Pet.App.* 15a). On the contrary, the prosecutor must disclose only evidence, which, if suppressed, would deprive defendant of a fair trial. *United States v. Bagley*, 473 U.S. 667, 675 (1985).

In this case, the prosecutors, who subjected petitioner to extraordinary, extremely prejudicial preindictment delay, also went to unconstitutional lengths to suppress vitally important evidence in their possession, and they thereby guaranteed petitioner's inability fairly to defend itself in this vicarious liability prosecution. They deprived petitioner of a bill of particulars (JA 25, 48). They somehow indicted petitioner for Elliott's alleged unauthorized violation of the Sherman Act without producing Elliott as a witness before the grand jury. In that manner, they suppressed the nature of Elliott's testimony until trial. They successfully opposed petitioner's pretrial motions for production of Elliott's statements to federal agents and prosecutors (JA 45, 46). They totally misled petitioner prior to trial by producing only a snippet of "Brady material" which depicted Elliott flatly denying, in 1987, any knowledge of any "collusion on school bids" (*Pet.App.* 66a). They successfully defeated petitioner's attempt to take Elliott's

deposition (JA 46; 50; 81C), and they misled petitioner further by advising the district court that it was unclear whether they would even call Elliott as a witness for the government at trial (JA 46).

Shortly thereafter, however, the prosecutors produced Elliott at trial as their star witness against petitioner in this prosecution under the vicarious liability rule. Elliott thereupon told a completely different story than the one attributed to him by the prosecutors in the aforesaid snippet of "Brady material". He changed his 1987 story of total innocence to one of personal guilt in 1991, and by so doing he placed the *criminal* yoke of vicarious liability for his alleged crime squarely on petitioner's back.

Elliott also disclosed for the first time at trial that he changed his story after more than 90 hours of intense interrogation by the prosecutors and other federal agents on more than 13 different occasions in 1991 (JA 372-78). That change developed only after the prosecutors also repeatedly granted Elliott full immunity from personal liability (*Pet.App.* 68-75a).

Accordingly, at the trial, petitioner again moved for immediate production of all notes and other evidence in the prosecutors' possession regarding Elliott's conflicting statements in 1987 and 1991. Petitioner stressed that, without such evidence, it could not effectively cross-examine Elliott as to how, when, why and under what circumstances he abandoned his 1987 protestation of innocence (JA 491-92). At one point, the district court stated the prosecutors "ought to turn them over" (JA 81ii). At the trial, however, the court again denied petitioner's motion ruling prosecutors are not obliged to produce their "work notes"; and he refused to order production even for his own *in camera* review (JA 493). Left practically defenseless, petitioner was quickly convicted of Elliott's alleged crimes and sentenced.

As stated *supra*, after the trial was over and this case was on appeal, the prosecutors proposed to call the same Mr. Elliott as a witness in a related case in the same district court (*United States v. Hughes, supra*). In that case, however, a different district judge ordered the prosecutors forthwith to produce the same Elliott interview notes and impeachment evidence they suppressed throughout this prosecution. *Amazingly, the prosecutors immediately complied without objection.* As a result, it was thereupon disclosed *for the first time* that Elliott had been carrying a grudge against both petitioner and his successor, Mr. Neale, since his discharge in 1986 (*Pet.App.* 63-65a). Consequently, in 1987, Elliott—bent on getting even with both—concocted a series of baseless criminal charges against them which the prosecutors found totally unsustainable (*Pet.App.* 63-65a).

In *Giglio v. United States*, 405 U.S. 150 (1972), this Court ruled that in criminal prosecutions such as this, where the government's case depends heavily on the testimony of a particular witness, that witness' *credibility* or *reliability* is a vitally important issue. Thus, it is incumbent on prosecutors in such cases to disclose any *impeachment* or *credibility* evidence in their possession so the witness can be effectively cross-examined before the jury. In *Giglio*, a conviction for cashing forged money orders was set aside and a new trial ordered because the prosecutors failed to disclose that the government's star witness had a personal stake in the outcome. Here, therefore, petitioner was plainly deprived of its right effectively to *impeach* Elliott's *credibility* or *reliability* before the jury by confronting him with the aforesaid evidence the government so tenaciously suppressed. The jury thus convicted petitioner on the basis of Elliott's testimony for the government without knowing that he too had a stake in the outcome (satisfaction of his grudge), or that he had been trying to gain petitioner's conviction on criminal charges—almost any criminal charge—since his dismissal in 1986.

It is also clear that the prosecutors willfully suppressed vitally important *impeachment* and *credibility* evidence contained in their notes covering their marathon interrogation interviews with Elliott. In the 1987 interviews, Elliott protested his innocence of school bid-rigging. In the 1991 interviews, he changed his story and imposed criminal liability on petitioner under the vicarious liability rule. Without the suppressed notes, petitioner could not effectively cross-examine Elliott as to when, why, how and under what circumstances he changed his testimony. *Clearly, he lied in 1987 or he lied in 1991. Petitioner was denied a fair trial when its ability to bring that evidence before the jury was foreclosed.* See *United States v. Bagley*, 473 U.S. 667 (1985). Plainly, if this *clearly material, improperly suppressed impeachment* and *credibility* evidence had been disclosed to the jury, the outcome of this vicarious liability prosecution might very well have been different. See *Bagley* at 105 S.Ct. 3384, 3385. In fact, after the prosecutors produced that same *impeachment* and *credibility* evidence in the closely-related case, *United States v. Hughes*, the prosecutors opted *not* to call Elliott as a witness, and Hughes was acquitted by the jury.

In this case, therefore, the prosecutors clearly had a "duty to produce" the decisive impeachment evidence they suppressed. See *United States v. Agurs*, 427 U.S. 97, 107 (1976). Their deliberate suppression of that critical evidence, in violation of petitioner's constitutional rights, requires reversal of petitioner's conviction. See *United States v. Tincher*, 907 F.2d 600 (6th Cir. 1990); *United States v. Knowles*, 594 F.2d 753 (9th Cir. 1979); *United States v. Beasley*, 576 F.2d 626 (5th Cir. 1978), rehearing denied 585 F.2d 796, *cert. denied* 440 U.S. 947.

3. This Court Should Review This Case Because Both The District Court And The Fourth Circuit Failed To Comply With The Jencks Act And This Court's Decision In Goldberg V. United States

The district court not only permitted the prosecutors to violate petitioner's rights under the Fifth and Sixth Amendments by suppressing vitally important impeachment and credibility evidence in this vicarious liability case, it also failed to comply with the Jencks Act, 18 U.S.C. 3500, and this Court's decision in *Goldberg v. United States*, 425 U.S. 94 (1976). The prosecutors steadfastly refused to produce Elliott's conflicting interview statements on the ground they were allegedly "attorney work notes" (JA 46). In pretrial proceedings, the district court sustained that refusal: "You don't have to turn over your work notes" (JA 46). Thereafter, when the employee appeared as a witness for the government at trial, petitioner again moved for production of his conflicting statements (JA 491). The prosecutors vehemently protested: "It would be an outrageous intrusion into the government's work product . . ." (JA 493). The district court again agreed: "I don't think they've got to turn over their notes" (JA 493). The district court did not even refer to the Jencks Act or *Goldberg*. It did not even order the prosecutors to produce the notes for *in camera* inspection while the employee was still a witness. It conducted no evidentiary hearing to determine whether the notes were "producible statements" under the Jencks Act.

Initially at least, the Fourth Circuit (J. Widener) correctly recognized these facts. In a pre-argument order, Judge Widener stated: "The district Court apparently did *not* examine the notes with reference to the Jencks Act . . . or the case of *Goldberg v. United States* . . ." (*Pet.App.* 42a). In its final decision, however, the Fourth Circuit (J. Hamilton) ruled that the district court did, in fact, comply with the Jencks Act by excluding the notes, *and it (the Fourth Circuit) thereupon made the initial factual deter-*

mination that the notes were not producible statements under the Act (*Pet.App.* 18-23a).

Petitioner submits that this case is substantially "on all fours" with *Goldberg v. United States*. In *Goldberg*, the district court, like the district court in this case, refused to order production of prosecutors' interview notes that contained a government witness' statement on the ground the notes were "the work product of counsel". The district court in *Goldberg*, like the district court in this case, thus did not require production of the interview notes for *in camera* review while the witness was still before the court; and it did not hold an evidentiary hearing to determine if the notes were otherwise 'producible' under the Jencks Act. The Ninth Circuit in *Goldberg*, like the Fourth Circuit in this case, erroneously affirmed *only* because it found no evidence in the record that the notes had been *adopted* or *approved* by the witness. Like the Fourth Circuit here, the Ninth Circuit thus made the initial determination that the prosecutors' notes were *not* 'producible statements' under the Jencks Act. This Court reversed, holding (a) the district court erred by denying production of the interview notes as "work product" of the prosecutors, and (b) the Ninth Circuit erred by making the initial factual determination, without any evidentiary hearing, that the notes were not 'producible statements' under the Jencks Act.

Plainly, therefore, the Fourth Circuit's decision must be vacated under *Goldberg*. Instead of remanding the case for a further evidentiary hearing before the same district judge on the issue of whether the prosecutor's notes are 'producible statements' under the Act, however, petitioner submits the lower courts' erroneous decisions should be remedied under the Fifth and Sixth Amendments by reversal and a new trial in line with *Brady*, *Giglio*, *Bagley* and the other cases cited *supra*. See also: *Clancy v. United States*, 365 U.S. 312 (1961).

4. This Case Should Also Be Reviewed Because The Fourth Circuit's Decision Conflicts With Important Statute of Limitations and Mail Fraud Decisions Of This Court

A. The Statute of Limitations—Grunewald v. United States

This case is governed by the five-year statute of limitations, 18 U.S.C. § 3282. In *Grunewald v. United States*, 353 U.S. 391, 396-97 (1957), this Court ruled that, in a criminal conspiracy case, the government has the burden of proving the offense is *not* barred by limitations. The government's burden is to prove "the conspiracy still subsisted within the [five] years prior to the return of the indictment" (353 U.S. 397). Thus, the government had to establish here that, *since the indictment was filed on July 30, 1991, the conspiracy was still in full force and effect on July 30, 1986—and that at least one overt act in furtherance of the conspiracy took place after that date* (July 30 1986). In addition, under *Grunewald*, the district court was obliged to charge the jury that the government, *not* the defendant, had the burden of proof regarding the statute of limitations (353 U.S. 396, 397; 413-15).

First, in this case, the district court failed to include the last mentioned *Grunewald* burden of proof requirement in its charge to the jury (JA 687-88). For this reason alone, petitioner's conviction should be vacated and set aside. In *Grunewald*, this Court stated, at 353 U.S. 415: "Since, under the judge's charge, the convictions . . . might have rested on an impermissible ground, we conclude that they cannot stand, and the petitioners must be given a new trial . . ." In this case, however, the Fourth Circuit failed even to mention this dispositive issue in its opinion.

Second, the government clearly failed to prove that the alleged conspiracy—which the Fourth Circuit recognized was subject to *reconfirmation* each year (See *Pet.App.* 26a)—was still in full force and effect on July 30, 1986.

Indeed, as the Fourth Circuit's opinion demonstrates, the evidence produced by the government itself at the trial actually proves that, *by May, 1986*, three of the four alleged 1984 conspirators (Pet, Incorporated; Pet's Virginia manager, Mr. Altaffer; and petitioner's former employee, Mr. Elliott) had all *completely withdrawn* from the Virginia marketplace, Virginia school milk sales and any interest or involvement in the alleged conspiracy. In this regard, the government proved that, by the end of 1985, Pet had sold its Virginia dairy and totally withdrawn from the Virginia milk market (JA 97, 98). In mid-1985, Altaffer retired from Pet because of ill health, and he likewise withdrew from the Virginia market (JA 144,205). And, in May, 1986, Elliott was removed from his position by petitioner, and was thus no longer able to act for petitioner (JA 352-53). This left only Douglas Stamper, and he was no longer employed by Pet or subject to Mr. Altaffer's direction and control. *Plainly, Stamper could not and did not "conspire" alone.* In this regard, it is settled: Section 1 of the Sherman Act is violated only by concerted action of *two* or *more* persons. *Holten v. Moore and Co.*, 702 F.2d 854, 855 (10th Cir. 1983); *White v. Hearst Corp.*, 669 F.2d 14, 18 (1st Cir. 1982); *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617 (9th Cir. 1979), *cert. denied* 447 U.S. 906 (1980).

Indeed, Elliott testified that he and Stamper met only "*twice*"—once in 1984 and once in 1985 (JA 310, 337). He could not recall any 1986 meeting with Stamper (JA 344; 350-54; 409-15). Stamper, in turn, testified that he could not "remember the contents or details" of any 1986 conversation with Elliott (JA 186). Confronted with this irrefutable evidence, the Fourth Circuit plainly erred by seeking to extend the terminated conspiracy beyond May, 1986 through sheer *conjecture* and *inference* alone. (*Pet.App.* 25-26a). In this connection, the Fourth Circuit ruled (*Pet.App.* 26a):

> "It is certainly a *reasonable inference* that when Neale reassumed the division manager's position on July 1, 1986, he desired to maintain continued compliance with the [1984] agreement. *Neale denies any knowledge . . .*" (Italics supplied)

There is absolutely *no* evidence whatsoever in the record to support the Fourth Circuit's gratuitous "*reasonable inference*". As the opinion recognizes, Neale categorically denied any such "desire" or involvement, and Stamper himself testified before the grand jury that, after Elliott was removed from his position, he attempted to discuss "prices" with Neale, but Neale absolutely refused to do so (See *Exhibit E, Petition for Rehearing*). In light of the federal milk industry antitrust investigation underway before the grand jury in Norfolk in 1986 and the subpoenas served on petitioner by the prosecutors, it is really absurd for anyone to suggest that petitioner or Neale would engage in a conspiracy to violate the Sherman Act at that time.

Consequently, petitioner submits the government did not carry its *Grunewald* burden of proof in this case, and that the Fourth Circuit's erroneous effort in this vicarious liability prosecution to extend the period of limitations by *baseless inference* alone must be set aside.

B. The Two Mail Fraud Counts—McNally v. United States

In this vicarious liability case, the prosecutors unjustly "piled on" by adding two extremely technical mail fraud counts to the alleged Sherman Act charge (JA 14-17). Essentially, they accused petitioner of illegal mail fraud merely because it received in the mail two checks in payment for milk sold and delivered to the City of Newport News in the regular course of business (JA 14-17). Those two checks were allegedly mailed on or about *September 11-12, 1986* and *March 17-18, 1987*—i.e. on dates long *after*

petitioner removed Elliott, and his participation in any alleged Sherman Act offense terminated (JA 15-17).

Under 18 U.S.C. § 1341—the Mail Fraud statute—an "intent to defraud" is an essential element of the crime. See *United States v. Kent*, 608 F.2d 542, 545 n.3, (5th Cir. 1980), *cert. denied* 446 U.S. 936. The government presented no evidence that petitioner intended to defraud the City of Newport News in 1986 or 1987, or at any other time. In fact, Elliott, testifying for the government, denied any such intent (JA 421).

Finally, petitioner's conviction under 18 U.S.C. § 1341, *as that statute read in 1986 and 1987*, is plainly reversible under this Court's decision in *McNally v. United States*, 483 U.S. 350 (1987), and its progeny.[7] In *McNally's* wake, courts have consistently held that mail fraud convictions based on *pre-1988* violations of 18 U.S.C. § 1341 must be set aside where there is no evidence of "concrete economic harm" to the victim of the alleged mail fraud. See *United States v. Asher*, 854 F.2d 1483, 1494 (3rd Cir. 1988); *United States v. Conover*, 845 F.2d 266 (11th Cir.1988); *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991). In this case, the indictment does not allege any such economic harm (JA 14-17), and no proof of economic harm was presented by the government at the trial. In fact, the evidence in this case actually demonstrates that, during the indictment period, petitioner's bid prices for Newport News' milk contract were actually *reduced* (JA 786, 789, 793), *and*

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[7] In 1988, legislation was enacted to overrule *McNally*. See 18 U.S.C. § 1346. However, it is settled that the 1986, 1987 charges against petitioner in this case must be adjudged according to the law in effect *prior* to 1988, to wit, in accordance with this Court's decision in *McNally*. See *United States v. Schwartz*, 924 F.2d 410 (2d. Cir. 1991), *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 791 (1st Cir. 1990), *cert. denied* 111 S.Ct. 536 (1991); *United States v. Bush*, 888 F.2d 1145, 1146 (7th Cir. 1989); *Fender v. Thompson*, 883 F.2d 303 (4th Cir. 1989); *Stephens v. Muncy*, 751 F.Supp. 1214 (E.D. Va. 1990), affd. 929 F.2d 694 (4th Cir. 1990).

the prices paid by Newport News were only slightly above petitioner's production-delivery cost level (JA 639).

The Fourth Circuit also erred by holding "there was no competition from other dairies" for the Newport News contract (*Pet.App.* 29a). In each of the indictment years, other dairies competed with petitioner for the business. And while the Fourth Circuit endeavored to suggest that petitioner "*intended*" to cause economic harm, Elliott vigorously denied any such intent throughout the trial (JA 421).

Finally, there is no evidence in the record of any complaint by Newport News regarding either the quality of petitioner's milk or the prices charged for that milk. In truth, an official of the Virginia Department of Education testified at the trial that, *while petitioner regularly sold its milk to schools for around 14¢ per half pint, the school systems, including Newport News, profited handsomely by reselling that same milk to school children for 20¢ to 30¢* (JA 286).

Based on this record, the lower courts plainly should have dismissed the two mail fraud counts for a variety of reasons, but mainly in line with this Court's decision in *McNally*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted:

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December 23, 1992

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Unpublished

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-5182

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARYLAND AND VIRGINIA MILK PRODUCERS COOPERATIVE ASSOCIATION, INC., d/b/a Marva Maid Dairy,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
John A. MacKenzie, Senior District Judge.
(CR-91-120-N)

Argued: June 3, 1992

Decided: September 15, 1992

Before WIDENER and HAMILTON, Circuit Judges, and STAMP, United States District Judge for the Northern District of West Virginia, sitting by designation.

Affirmed by unpublished opinion. Judge Hamilton wrote the opinion, in which Judge Widener and Judge Stamp joined.

COUNSEL

ARGUED: Edward Lawrence Merrigan, Sr., JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DE-

NEGRE, Washington, D.C., for Appellant. Andrea Limmer, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** William O. Bittman, Alexander P. Starr, REED, SMITH, SHAW & MCCLAY, Washington, D.C., for Appellant. James R. Rill, Assistant Attorney General, Charles A. James, Deputy Assistant Attorney General, John J. Powers, III, Terrence F. McDonald, Marc W.F. Galonsky, Kerry J. Clarke, Philip J. Buri, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

HAMILTON, Circuit Judge:

Defendant-appellant, Maryland and Virginia Milk Producers Cooperative Association, Inc.,[1] was convicted by a jury of one count of violating the Sherman Act, 15 U.S.C. § 1, and two counts of mail fraud, 18 U.S.C. § 1341. Appellant raises numerous issues on appeal, asserting error by the district court in:

(1) denying its motion to dismiss the indictment because of pre-indictment delay;

(2) denying its request for the government to produce interview notes taken while debriefing Charles Elliott;

(3) finding sufficient evidence that the conspiracy continued into the limitations period;

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[1] The appellant is composed of several divisions, including the Marva Maid Dairy, the principal focus of this prosecution. The appellant shall be referred to alternatively as "the Cooperative" or "Marva Maid."

(4) finding sufficient evidence that the Cooperative had the requisite intent to violate the Sherman Act;

(5) finding sufficient evidence that it committed mail fraud; and

(6) abusing its discretion in imposing sentence.

Finding no merit to these claims of error, we affirm.

I

Organized in 1920, the Cooperative is a nonprofit, nonstock membership agricultural corporation, owned and operated by approximately 1,400 dairy farmers who produce milk in Delaware, Maryland, Pennsylvania, Virginia and West Virginia. The management of the Cooperative consists of a board of directors, all of whom are dairy farmers elected to represent various membership districts in the five-state area. The net earnings of the Cooperative are distributed to its members, who then pay federal and state taxes on that income.

The principal mission of the Cooperative is to sell raw milk produced by its member-farmers. The Cooperative accomplishes this through a marketing division. The Cooperative also has a manufacturing division, where excess raw milk is manufactured into powdered milk and butter; an equipment division, which buys equipment at favorable prices; a Southside division, which is a group of farmers in Southside, Virginia; and the Marva Maid division, known as Marva Maid Dairy.

Marva Maid Dairy was built in 1962 in Newport News, Virginia. Marva Maid processes a portion of the member-farmers' raw milk into processed milk, butter, cream and similar dairy products and competes for commercial, military and school sales in the Tidewater and Colonial Heights-Petersburg markets of Virginia.

Public schools in the Commonwealth of Virginia purchase half-pint cartons of milk for school lunches on the basis of competitive bids. In the spring, schools send invitations to bid to various dairies in the area. The contracts usually cover whole milk, low-fat milk and chocolate milk, and they also include other dairy products, such as ice cream or cottage cheese.[2] Not all dairies respond to the bid solicitation. Bids must be submitted in sealed envelopes by a specified date and time. The bids are publicly opened and announced, and the contract is awarded to the lowest bidder. The schools receive state and federal funds to subsidize the purchase of milk products. State and federal regulations require competitive bidding for these products, in order to obtain the lowest price for the products involved. Most school districts in Virginia require signed bids to contain an express affirmation that the bid is not the result of collusion or agreement with any other bidder. This is "to enhance and encourage competition," Joint Appendix (J.A.) at 490, because competition "guarantees the lowest price and the best service." *Id.* Contracts are awarded in the spring or summer for the following school year. Contracts usually run for a period of twelve months beginning in the late summer.

The government's conspiracy theory alleged that Marva Maid conspired with several other milk companies, namely Pet Dairy, Inc. (a division of Pet, Inc. until 1985 and then a division of Land-O-Sun, Inc.), to rig the bidding process for the procurement of milk by school districts. The conspiracy focused on three key players, Charles Elliott, Lawrence Altaffer and Douglas Stamper. In September 1983, Elliott was hired by Marva Maid to replace Thomas Neale, Jr. as the division manager of Marva Maid, and after a training period where Neale advised Elliott on Marva Maid's operations, Elliott assumed this position on April

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[2] References in the opinion to the procurement of milk or school milk contracts will include milk and its associated products.

1, 1984. Neale remained with Marva Maid as an advisor. Prior to joining Marva Maid in 1983, Elliott was employed by the Virginia region of one of Marva Maid's competitors, Pet Dairy. From 1983 until his retirement on October 1, 1985, Altaffer was general manager of the Virginia region of Pet Dairy. When Altaffer retired, Stamper replaced Altaffer as general manager of Pet Dairy's Virginia region.

Pet Dairy competed with Marva Maid in parts of Virginia for school lunch contracts. Altaffer and Stamper were responsible for calculating and bidding on school milk contracts for Pet Dairy. As for Marva Maid, the bidding responsibilities fell upon Neale for about a year after Elliott was hired and then upon Elliott himself.

Initially, Pet Dairy was very concerned about Elliott's presence at Marva Maid because Elliott knew too much about Pet Dairy's operation. Pet Dairy also feared that Elliott would be aggressive at the reins of Marva Maid and would seek to capture some of Pet Dairy's customers. In an effort to avoid this, Altaffer asked Stamper to arrange a meeting between Elliott and Stamper to get a sense of Elliott's intentions. Stamper, Altaffer and Elliott testified they participated in meetings and conversations in which they agreed on behalf of Pet Dairy and Marva Maid to rig the bids for school milk contracts for the school years 1984-85, 1985-86 and 1986-87.

Stamper and Elliott met in the spring of 1984 to discuss, among other things, school milk accounts. Elliott said that he wanted more school accounts than were currently held by Marva Maid. Afraid that Elliott would aggressively go after many of Pet Dairy's existing school contracts, Pet Dairy agreed to let Marva Maid be the low bidder for the upcoming year on the Williamsburg contract, a contract that Pet Dairy had held in the preceding school years.[3]

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[3] Elliott was originally interested in getting the Hampton school account because of its close proximity to Marva Maid's operations, but

Pet Dairy and Marva Maid agreed further that each company would retain all other school district contracts that they presently held. To effectuate this allocation, Pet Dairy agreed to bid higher on the upcoming bid for Williamsburg than it had the previous year, and they discussed specific minimum prices to bid.[4] Stamper and Elliott departed the meeting having agreed that Pet Dairy would bid high on certain contracts allocated to Marva Maid, and that Marva Maid would bid high on certain contracts allocated to Pet Dairy. It was understood by the parties that the agreement would continue beyond 1984, subject to reconfirmation each year.[5] As a result of this agreement, Marva Maid was eventually awarded the Williamsburg school contract and both Pet Dairy and Marva Maid retained the accounts they had previously held in 1983.

Stamper and Eliott met again in the spring of 1985 and discussed rising milk prices, raw milk cost increases, the need for escalator clauses and their relative shares of school milk contracts in the marketplace. They reviewed the contracts for the previous year, and neither expressed any dissatisfaction with the current agreement and agreed to continue to maintain their same relative shares in the marketplace for the 1985-86 school year. Stamper and Elliott agreed that Pet Dairy would keep its schools for the upcoming 1985-86 school year, and that Pet Dairy "would not be a problem on the schools that Marva Maid had," permitting Marva Maid to retain those contracts. As they did in 1984, they exchanged the numbers that they would use to bid for the forthcoming year. Pet Dairy and Marva

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settled on the Williamsburg contract, which is also relatively close to Marva Maid's operations.

[4] Because they knew what the bid prices were for the prior year and what cost increases had occurred during the school year, bidding "high" entailed submitting a bid that would "exceed that range sufficiently as to—not to be a real contender" on the contract. J.A. at 324, 327, 330.

[5] Elliott and Stamper essentially agreed on the approximate amount of their bids to deflect any signs of collusion or bid rigging.

Maid bid in accordance with their agreement and each won its assigned contracts. Elliott left the meeting feeling the agreement would continue beyond the 1985-86 school year, subject to reconfirmation.

Stamper testified that he again met with Elliott in the spring of 1986 and discussed the bids on whole milk, low fat chocolate milk and low fat milk, and that he agreed with Elliott to continue the same allocation from the previous year. By this time, Altaffer had retired and Stamper had taken over as region manager for Pet Dairy. Stamper also testified that he discussed the bids he and Elliott would submit, once again to deflect any signs of collusion. Elliott testified that he did not recall a meeting in 1986, but was certain there was a conversation between Neale or himself and Stamper solidifying the continuation of the agreement. Thereafter, Marva Maid and Pet Dairy were again awarded the contracts they had previously held in 1985-86 school year.[6]

To summarize, both Marva Maid and Pet Dairy were paid for and performed the contracts they were awarded for the 1984-85, 1985-86, 1986-87 school years. The payments included two checks that were mailed by the City of Newport News, Virginia to Marva Maid for the performance of the 1985-86 (mailed in September 1986) and 1986-87 (mailed in March 1987) school lunch contracts.

In 1986, the Antitrust Division of the Justice Department conducted an investigation (1986 Investigation) of dairies that operated in the Richmond area. The 1986 In-

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[6] Shortly thereafter, Elliott was demoted in May 1986 and finally dismissed in December 1986. Elliott was not demoted for his bid rigging activities, rather he was dismissed because the board of directors believed Elliott was too aggressive in the marketplace and disliked the fact that he was destabilizing the market and upsetting the *status quo*. In July 1986, Neale took over as division manager at Marva Maid. Elliott testified that Neale was pleased about and condoned the bid rigging agreement.

vestigation focused primarily on alleged bid rigging on military milk contracts because the Defense Personnel Support Center was suspicious as to why it appeared that certain dairies received the same contracts each year. In July 1986, a federal grand jury subpoenaed recordsfrom [sic] the Cooperative that included all records pertaining to Marva Maid's bids, including bid files, workups, estimates, determinations of price and the submission of any bid for the sale of dairy products to the military, schools or any other customer in excess of $25,000, for the period of January 1, 1980 through July 1986. The Cooperative complied with the subpoena. Neale along with another official from a competing dairy testified before the grand jury and denied any bid rigging on milk contracts. The government also interviewed Elliott on four occasions in April 1987, and he denied any bid rigging on milk contracts. The government took notes during these interviews.

In 1988, because the government had insufficient evidence to indict any of the target dairies, the government closed the investigation and returned the subpoenaed documents to the Cooperative. After closing the 1986 Investigation, the Department of Justice (DOJ) began investigating bid rigging on milk contracts in the State of Florida. During the course of this investigation, the DOJ discovered that bid rigging on school milk contracts might have occurred in the Richmond-Norfolk area of Virginia. In April 1990, a special grand jury began an investigation specifically focusing on bid rigging on school milk contracts. The primary targets of this investigation were Marva Maid, Pet Dairy and a number of other local dairies.

In May 1990, the Cooperative was served with another subpoena. This subpoena demanded the production of bid documents and related supporting evidence for the period January 1, 1984 through May 1990. On June 12, 1990, the Cooperative responded to the subpoena by producing documents, but some of Marva Maid's bid documents relating to the school years 1982-83, 1983-84, 1984-85, 1985-86 and

1986-87 (approximately twenty-five percent of what was previously produced) were not produced because they had been discarded by the Cooperative after the government closed the 1986 Investigation. The Cooperative had bid documents relating to the years in which the conspiracy ran its course (1984-87) and the particulars of the bids were also available from the school districts to which they were submitted. The government responded to the Cooperative via letter stating the Cooperative's response to the 1990 subpoena appeared incomplete.

In April 1991, the government served the Cooperative a third subpoena demanding the production of all missing bid documents, bid worksheets, correspondence, vouchers and other internal documents related to Marva Maid's bids for the 1984-85, 1985-86 and 1986-87 school years for the Colonial Heights, Dinwiddie, Hopewell, Newport News, Norfolk, Petersburg, Prince George, Sussex, Williamsburg/James City and York County, Virginia, school systems. On June 10, 1991, the Cooperative informed the government that it produced all of the documents still in its files in response to the second subpoena served in 1990.

Between January and September 1991, the government interviewed Elliott on various occasions. The total time the government spent interviewing Elliott was approximately eighty to ninety hours. The government took notes during these interviews and also granted Elliott immunity. In May 1991, Stamper pleaded guilty to rigging school milk contracts, and the special grand jury returned an indictment against the Cooperative on July 30, 1991. Of particular note, Pet Dairy was not a target of the 1986 Investigation and was not requested to produce documents with respect to that investigation.

The four-count indictment charged the Cooperative with a violation of the Sherman Act, 15 U.S.C. § 1, two counts of mail fraud, 18 U.S.C. § 1341 and one count of filing false, fictitious and fraudulent statements, 18 U.S.C.

§ 1001, all arising out of the alleged conspiracy to rig bids on school milk contracts. Immediately after the indictment was filed, the Cooperative moved for a bill of particulars. That motion was opposed by the government and denied by the district court. The Cooperative also moved for the production of all *Brady* material, and the government responded in a letter that reads in part: "During an interview with Department of Justice attorneys, an agent from Naval Investigative Service and [sic] agent from the Defense Criminal Investigative Service on April 2, 1987 at the office of the U.S. Attorney in Norfolk, Virginia, Charles Elliott stated that he had no basis to believe there had been collusion on school bids. . . ." J.A. at 35.

In response to this letter, the Cooperative filed a motion to compel production of all statements made by Elliott. At the hearing, the government opposed the motion, arguing it only possessed attorney work notes and that it had not made a determination as to whether Elliott would be called as a witness. The government also advised the district court that it had no verbatim statements of Elliott. The district court refused to order production of the notes and mistakenly directed the Cooperative to take Elliott's deposition. The Cooperative then served a subpoena on Elliott, and the government moved to quash. The district court quashed the subpoena, ruling that Elliott could be interviewed but not deposed. Elliott refused to be interviewed.

At trial, the government called three witnesses to testify, Elliott, Stamper and Altaffer. During Elliott's testimony, it was disclosed that Elliott had been granted immunity four times and prosecutors interviewed Elliott concerning his activities in the conspiracy between eighty and ninety hours during 1991. At that time, the Cooperative again moved for production of the government's notes made during the Elliott interviews. The Cooperative argued that the notes would shed light on why Elliott's account of bid rigging and collusion had changed between

1987 and 1991. The government argued to the district court that it complied with the Jencks Act and *Brady* inasmuch as it provided the contents of Elliott's 1987 statement and offered to produce the notes to the court for an *in camera* inspection. The district court denied the motion and declined to examine the notes *in camera* at that time.

At the conclusion of all evidence, the district court granted the Cooperative's motion for judgment of acquittal on the false statement count. The jury returned verdicts of guilty on the Sherman Act count and the two mail fraud counts. The Cooperative filed a motion for a new trial. At that time, the district court conducted an *in camera* review of the notes and ruled that they need not have been produced because there was no "basis in law or fact" to support the Cooperative's allegations. The district court did not explicitly cite to *Brady* or the Jencks Act.

The district court sentenced the Cooperative to a fine of $1,000,000 on the Sherman Act count and $50,000 on each of the mail fraud counts. The Cooperative appeals.

II

Marva Maid initially argues that the preindictment delay denied it due process. We do not agree. It is well settled that one of the guarantees of the Fifth Amendment is that a defendant will not be subjected to excessive preindictment delay. In *United States v. Automated Medical Laboratories, Inc.*, we adopted a "two pronged inquiry when preindictment delay is alleged to violate due process." 770 F.2d 399, 403 (4th Cir. 1985). It is the defendant's burden to demonstrate: first, that he has suffered actual prejudice and second, that the delay, balanced against the reasons for the delay proffered by the government, offends "fundamental conceptions of justice" or "the community's sense of fair play and decency." 770 F.2d at 404 (quoting *United*

States v. Lovasco, 431 U.S. 783, 790 (1977)); *United States v. Marion*, 404 U.S. 307 (1971).

"The defendant has a heavy burden to prove that a preindictment delay caused actual prejudice: the proof must be definite and not speculative, and the defendant must demonstrate how the loss of a witness and/or evidence is prejudicial to his case." *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986) (citations omitted).

In *Marion*, the Court did not specifically address what circumstances constituted actual prejudice requiring dismissal of the indictment, noting that such a determination was to be made on a case-by-case basis. 404 U.S. at 324-26. The Court also noted: "[a]ctual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution." *Id.* at 324-25.

Marva Maid argues that it was prejudiced because: (1) it was unable to interview Elliott because he was fired in December 1986 and refused to be interviewed and (2) it innocently discarded some of its bid documents after the documents were returned to Marva Maid at the close of the government's 1986 Investigation. We find the prejudice here is slight and does not rise to constitutional dimension. The record demonstrates that Marva Maid had every opportunity to question Elliott at length at trial and develop its theory of defense. In addition, the prejudice arising from the loss of the bid documents was minute. First, Marva Maid, other than its bald assertion that it lost key and essential documents, has not identified any *specific* documents that prejudiced its case or prevented it from piecing together the bid workups from the years at issue, or the years that preceded the conspiracy. Second, Marva Maid had every opportunity to question Elliott and Neale (a defense witness), who were responsible for the prepa-

ration of the bids in question. Finally, the bid documents in question were available from school districts to which the bids were submitted.

Weighing the meager prejudice against the reasons for the delay proffered by the government does not offend our sense of "fundamental conceptions of justice" or "the community's sense of fair play and decency." *Lovasco,* 431 U.S. at 790. First, the nature of an antitrust investigation cannot be overlooked. Often such an investigation, especially one involving a conspiracy such as this, will take many years to conduct and conclude. Mindful of this, the proper guide here is to ensure that the indictment is in place within the statute of limitations period. *See United States v. Ewell,* 383 U.S. 116, 122 (1966) ("the applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale charges"). As discussed in Part IV A, *infra,* the indictment fell within the applicable limitations period. Second, and most importantly, during the 1986 Investigation, the government was hampered due to Elliott's and other dairy officials' denial of knowledge of any bid rigging. Finally, the 1986 Investigation did not involve Pet Dairy. Rather, it focused primarily on military milk projects, and the 1990 Investigation concerning school bid rigging arose only after an investigation in Florida led prosecutors to believe that there was, in fact, bid rigging on school milk contracts in Virginia.

In the case *sub judice,* the reasons for the government's failure to indict at the conclusion of its 1986 Investigation are pointedly akin to insufficient evidence rather than an attempt "to gain a tactical advantage over the accused." *Marion,* 404 U.S. at 324. Posited as such, we are guided here by *Lovasco* in so far as "prosecutors do not deviate from 'fundamental conceptions of justice' when they defer seeking indictments until they have probable cause to believe an accused is guilty; indeed it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause." 431 U.S. at 790-91. Because Elliott's

180-degree turn provided the primary catalyst in the return of the later indictment, and the government did not delay in pursuing the indictment thereafter, *see Lovasco*, 431 U.S. at 795 n.17 (possibility of due process violation upon showing prosecutorial delay incurred in reckless disregard of the circumstances), we perceive no error. It is also worthy of note that other circuits find no due process violation in the absence of prejudice *and evidence that the government intentionally delayed to seek a tactical advantage. See, e.g., United States v. Sims*, 779 F.2d 16, 17 (8th Cir. 1985) (defendant must show that the "government intentionally delayed seeking an indictment to gain tactical advantage and that the delay substantially prejudiced his defense"); *United States v. Benson*, 846 F.2d 1338 (11th Cir. 1988) (same). Essentially, Marva Maid would have us dismiss this indictment when the government: (1) sought no tactical advantage: (2) reopened its investigation only after it came across newly discovered evidence, namely, the testimony of Elliott; and (3) diligently investigated and prosecuted the case thereafter. This we cannot intimate. Here the record is totally devoid of any attempt to gain a tactical advantage or neglect or recklessness in attempting to prosecute. We hold, therefore, that there was no denial of Marva Maid's due process rights.

III

Marva Maid makes its most salient argument under *Brady* and the Jencks Act with respect to the government's failure to turn over the "Elliott interview notes."[7] We shall address each of these arguments in turn.

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[7] We recently granted appellant's motion to correct and supplement the record based on appellant's suggestion that there were "Elliott interview notes" submitted to Judge Doumar in a related case, *United States v. Hughes*, Cr. Action No. 92-25-N, United States District Court of the Eastern District of Virginia, Norfolk Division, that were not submitted to Judge MacKenzie. We have conducted an *in camera* in-

A

Marva Maid claims that the government violated the dictates of *Brady v. Maryland*, 373 U.S. 83 (1963), because the government failed to produce the Elliott interview notes. As a result, Marva Maid argues to this court that a new trial is warranted. The *Brady* rule is grounded in due process. "Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *United States v. Bagley*, 473 U.S. 667, 675 (1985) (footnotes omitted).

"Suppression of exculpatory evidence by the government that is material to the outcome of the trial violates due process." *United States v. Curtis*, 931 F.2d 1011, 1014 (4th Cir.), *cert. denied*, 112 S. Ct. 230 (1991). Under *Brady*, upon defendant's request, the government must disclose material evidence favorable to the defense. Evidence is material when " 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Curtis*, 931 F.2d at 1014 (citing *Bagley*, 473 U.S. at 682). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) (citations omitted). *Brady* also requires the disclosure of impeachment evidence that

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spection of the "Elliott interview notes" submitted to Judge Doumar in *Hughes* and conclude they are identical, with the following exception, to the notes submitted to Judge MacKenzie and this court. Notes taken by the government after the Cooperative's trial were also proffered to this court pursuant to its order granting appellant's motion to correct and supplement the record. These notes, taken by the government while interviewing Elliott, were obviously not required to be produced to Judge MacKenzie because they did not exist at the time of the Cooperative's trial.

is material. *Bagley,* 473 U.S. at 676. Material impeachment evidence is that which "if disclosed and used effectively, it would make the difference between conviction and acquittal." *Id.; See also, Giglio v. United States,* 405 U.S. 150, 154 (1972) (nondisclosure of impeachment evidence falls under *Brady* when reliability of witness may well be determinative of guilt or innocence).

In the present case, Marva Maid sought the production of the government's notes made during Elliott's extensive interviews in 1991. Under such circumstances, it is within the discretion of the district court to accord proper discovery. In certain instances, an *in camera* inspection may be required and, perhaps, an eviden tiary [sic] hearing. As to the proper course to select, district courts should be given broad discretion and simply guided by fundamental fairness which is the cornerstone of *Brady.*

Marva Maid claims that, in light of the vicarious nature of the pending charges, it was "crucially important . . . for the government to disclose *exculpatory, impeachment* or *credibility* evidence contained in the notes . . . ." Reply Br. at 9 (emphasis in original). The government argues that it complied with *Brady* inasmuch as it produced the contents of Elliott's 1987 statement in which he indicated he had no basis to conclude there had been collusion on school bids, an obvious inconsistent statement in light of his testimony at trial. We believe that the government complied with the dictates of *Brady.*

Without citing *Brady,* the district court examined the notes after the trial and held that they did not have to be produced because there was no "basis in law or fact" to warrant disclosure. Our own *in camera* review of the notes leads us to the same inescapable conclusion; there is nothing to suggest that the result would have been different had the notes been produced. The only impeachment or exculpatory evidence in the notes is the reference to Elliott's 1987 inconsistent statement. Marva Maid at

trial cross-examined Elliott extensively on this inconsistent statement. Marva Maid also questioned Elliott regarding his alleged bid rigging activities and his decision to cooperate with the government. In these regards, the documents would have been only duplicative and cumulative.

Marva Maid's argument misses the mark. Marva Maid would have us focus our inquiry on the impact of the undisclosed evidence on its ability to prepare for trial as opposed to the materiality of the evidence to the issue of guilt or innocence. Undoubtedly, this is due to the vicarious nature of the case and the fact that it had not seen the notes in question. However, these facts do not enter the calculus. An argument identical to that raised by Marva Maid was rejected in *United States v. Agurs,* 427 U.S. 97 (1976). There, the Court observed in rejecting the notion that the *Brady* inquiry should focus on the defendant's ability to prepare for trial:

> [s]uch a standard would be unacceptable for determining the materiality of what has been generally recognized as '*Brady* material' for two reasons. First, that standard would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense. Second, such an approach would primarily involve an analysis of the adequacy of the notice given to the defendant by the State, and it has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge.

427 U.S. at 112 n.20.

Consequently, going into trial, Marva Maid had all the impeachment evidence from the notes required under *Brady,* but the jury chose to believe the government's theory that Elliott lied in 1987 when he represented that

he had no basis to believe there had been collusion on school milk bids. This is neither a case in which the key government witnesses had a personal stake in the outcome of the litigation which was not disclosed, *see Giglio,* 405 U.S. at 154-55 (government withheld information that it had promised a coconspirator that he would not be prosecuted if he testified); Bagley, 473 U.S. at 683 (government failed to disclose that it had contract with witnesses to supply information), nor one where the government withheld evidence "so clearly supportive of a claim of innocence that it [gave] the prosecution notice of a duty to produce." *Agurs,* 427 U.S. at 107. This is a case where the government met its obligation under *Brady* by providing all of the exculpatory and impeachment evidence it possessed. In sum, we conclude there is not a "reasonable probability that, had the [Elliott interview notes] been disclosed to the defense, the result of the proceeding would have been different." *Bagley,* 473 U.S. at 682.

B

Marva Maid also argues that the government failed to comply with the Jencks Act, 18 U.S.C. § 3500, by failing to produce the Elliott interview notes after Elliott testified at trial.

The Jencks Act provides that after a witness for the United States has testified on direct examination, the United States must produce "any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. 3500(b). A "statement" is defined as: (1) a written statement made by the witness and signed or otherwise adopted or approved by him; (2) a substantially verbatim transcription and contemporaneous recording of the oral statement of the witness; or (3) a statement made by the witness to a grand jury. 18 U.S.C. 3500(e). If the statement sought to be produced qualifies as a "statement" under the Act, but the govern-

ment claims that it does not relate to the subject matter of the testimony of the witness, then the court must order the statement to be produced for *in camera* inspection to determine the relevance of the statement. 18 U.S.C. § 3500(c).

In *Goldberg v. United States,* the Supreme Court noted:

> Every witness interview will, of course, involve conversation between the lawyer and the witness, and the lawyer will necessarily inquire of the witness to be certain that he has correctly understood what the witness has said. Such discussions of the general substance of what the witness has said do not constitute adoption or approval of the lawyer's notes within § 3500(e)(1), which is satisfied only when the witness has 'signed or otherwise adopted or approved' what the lawyer has written. This requirement is clearly not met when the lawyer does not read back, or the witness does not read, what the lawyer has written.

425 U.S. 94, 110 n.19 (1976). In his concurrence in *Goldberg,* Justice Powell noted:

> The proper administration of the Act requires that the defendant meet an initial burden of showing that collateral inquiry is necessary to protect his rights under the Act .... This requirement is also appropriate because the trial should not be interrupted for collateral proceedings absent a genuine need for them....
>
> The burden on the moving defendant is not to prove the existence of a statutory 'statement.' The purpose of the collateral proceedings is to resolve that issue. Rather, the burden is simply to establish by probative evidence—usually in cross-examination of the witness alleged to have given a statement—that there is reason to believe

> that a statutory 'statement' may exist. Certainly more must be shown than a speculative possibility. If, as here, the defendant's theory is that a prosecutor's notes meet the requirement of subsection (e)(1), the questions must be asked the witness that focus on whether there was in fact an 'adoption or approval' of a specific statement, rather than general concurrences in the correctness of the prosecutor's understanding of what the witness knows. Absent explicit answers to such questions that satisfy the defendant's burden, the trial judge should deny the motion for production without the collateral proceeding.

425 U.S. at 123.

It is well settled that prosecutors are not required to take notes that qualify as Jencks Act statements when they interview witnesses. *United States v. Marino,* 648 F.2d 367, 387 (5th Cir. 1981), *cert. denied,* 456 U.S. 943 (1982). Here, the government admitted prior to trial that it had "attorney work notes" of Elliott's interviews, but stated that the notes were not Jencks Act "statements." Furthermore, when Elliott testified at trial, Marva Maid cross-examined him extensively about his meetings with government prosecutors. Defense counsel specifically asked Elliott whether the government and Elliott's attorneys took notes at these meetings (which Elliott answered affirmatively), and whether the government "ever show[ed] you any statements that you had given, or notes or what have you during any of these 80 or 90 hours that he had spent interviewing you?" Elliott responded, "No, sir. They just asked me questions and questions and questions." J.A. at 377. The district court heard the vehement arguments of the defense as to why the notes should be disclosed under the Jencks Act, but declined to order production. The district court was aware of Elliott's testimony at that time and the government's proffer that the notes did not con-

tain Jencks Act statements and ruled in accordance with those affirmations.

Interview notes are not Jencks Act statements unless the witness signed or otherwise adopted or approved the notes, or the notes were substantially verbatim notes of the witness interview. *United States v. Welch,* 810 F.2d 485, 490 (5th Cir.), *cert. denied,* 484 U.S. 955 (1987). Here, to qualify as a Jencks Act statement, Elliott "must have signed, read, or heard the entire statement read." *United States v. Pierce,* 893 F.2d 669 (5th Cir. 1990) (citing *United States v. Hogan,* 763 F.2d 697, 704 (5th Cir. 1985)); *See also, United States v. Hinton,* 719 F.2d 711, 715 (4th Cir. 1983), *cert. denied,* 465 U.S. 1032 (1984) (government notes of a witness' statements do not constitute a Jencks Act "statement" "unless it reflects the witness' own words fully and without distortion," and is coupled with "a 'finding of unambiguous and specific approval' of specific notes").

On cross-examination, the defense tried (but to no avail) to develop a theory that Elliott had adopted or approved the notes. Marva Maid asked Elliott whether the government had ever showed him the notes, and Elliott replied in the negative. Marva Maid could have easily asked Elliott questions as to whether the government wrote down passages verbatim or read the notes back to him, but did not. This cross-examination of Elliott did not create an adequate foundation that would necessitate further inquiry as to whether Elliott adopted or approved the notes. *Goldberg,* 425 U.S. at 109; *Pierce,* 893 F.2d at 675. Similarly, there is no evidence in the record to demonstrate that the notes were a substantially verbatim transcription of Eliott's statements. Marva Maid was not entitled to view the interview notes because they do not constitute Jencks Act statements of Elliott.

Marva Maid argues that the district court should have conducted an *in camera* inspection of the notes. We dis-

agree. First, we note an *in camera* inspection is not *per se* required. *See United States v. Herrero,* 893 F.2d 1512, 1524 (7th Cir.) ("Because the extrinsic evidence in this case concerning the preparation of the interviewers' notes so clearly established that they did not fall within the definition of Jencks Act statements, there was no need to conduct an *in camera* inspection . . . ."), *cert. denied,* 110 S. Ct. 2623 (1990); *United States v. Allen,* 798 F.2d 985, 995 (7th Cir. 1986) (*in camera* inspection is not statutorily mandated for a determination of whether document constitutes a Jencks Act statement). Second, under the circumstances, the district court acted within its discretion in refusing to conduct an *in camera* inspection or evidentiary hearing under *Goldberg* and its progeny. *Pierce,* 893 F.2d at 675 (*in camera* inspection required only "if a timely request is made by the defense *and* some indication exists in the record that the notes meet the Jencks Act definition of a statement") (emphasis in original) (citations omitted). As discussed, *supra,* there is nothing in the record to inferentially support a finding that the notes were Jencks Act statements.

Where a proper evidentiary foundation is laid, district courts should be keenly aware of the need, especially in vicarious liability cases such as the one before us,sufficient factual determinations as to whether interview notes are Jencks Act state-ments [sic]. We, however, are of the impression that the record is adequately developed before us to conclude that (1) Marva Maid did not create an evidentiary foundation that the notes were Jencks Act statements and (2) the notes were not Jencks Act "statements."

In light of this, a collateral proceeding would only unduly delay the proceedings. Under these pellucid circumstances, Marva Maid was not entitled to an *in camera* determination or an evidentiary hearing below as to whether the notes should have been produced. In addition, we feel that requiring an *in camera* inspection or an ev-

identiary hearing in this case would be akin to sanctioning a fishing expedition. The only conceivable mechanism that would illustrate adoption or approval would be to permit a hearing in which the defense would attempt to show that Elliott had adopted or approved the notes despite his very specific testimony to the contrary, the notes themselves, and the government's representation that Elliott had not adopted or approved the notes. This we decline to do. While there may be circumstances where a criminal defendant could go outside a witness' testimony denying approval, the notes themselves, and the government's proffer that the witness did not adopt or approve the notes, this is not such a case.

The district court heard the strong arguments of the defense as to why the notes should be disclosed under *Brady* and the Jencks Act before, during, and after the trial. The district court was aware of Elliott's testimony at trial and the government's proffer that the notes did not contain *Brady* material or Jencks Act statements when it ruled at trial and on the motion for new trial in accordance with those affirmations. Marva Maid has simply not presented a scintilla of evidence demonstrating that Elliott even tacitly adopted or approved the notes, and thus, no remand is required.[8]

IV

Marva Maid raises numerous issues regarding its conviction under the Sherman Act, 15 U.S.C. § 1. We shall address each of these arguments in turn.

A

Marva Maid argues that the government failed to prove that the alleged Sherman Act violation occurred within the

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[8] We also note that strictly applying the harmless test to the case at bar, any error was harmless beyond a reasonable doubt. *Goldberg*, 425 U.S. at 112.

applicable five-year statute of limitations period. The Sherman Act count alleged that the conspiracy to rig bids began in 1984 and continued until the summer of 1987. The basis of this theory, as proved at trial, was that a reconfirmation meeting or conversation took place in the spring of 1986 that rigged the bids for the school year 1986-87. The indictment was filed on July 30, 1991.

In *United States v. Kissel,* Justice Holmes, writing for the Court, observed that if a conspiracy contemplates a continuance in time, the "conspiracy continues up until the time of success or abandonment." 218 U.S. 601, 608 (1910). In *Grunewald v. United States,* the Supreme Court noted: "[T]he crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy." 353 U.S. 391, 397 (1957). "Thus, as long as some action is necessary to achieve a conspiratorial objective, a conspiracy, under the Sherman Act or otherwise, continues until the offense has been abandoned or until the objective is accomplished." *United States v. A-A-A Electric Co., Inc.,* 788 F.2d 242, 245 (4th Cir. 1986) (citations omitted). In light of this, "[T]he statute of limitations period begins to run, not from the date of the legally cognizable harm, but from the date of the last overt act." *Id.* (citations omitted).

In the case at bar, there is demonstrable evidence showing significant appreciable knowledge and participation in the conspiracy within the limitations period. The indictment was filed July 30, 1991, and charged Marva Maid with engaging in a conspiracy to rig bids from "[b]eginning at least as early as the spring of 1984 and continuing through the end of the 1986-1987 school year . . . ." J.A. at 8. The government presented evidence that the conspiracy had its origins early in 1984 and that Elliott and Stamper agreed in 1986 to continue the bid rigging agree-

ment for the 1986-87 school year. Marva Maid accepted money from these rigged bids from various school districts in 1986 and 1987, including checks in September 1986 for the 1985-86 rigged bids and in March 1987 for the 1986-87 rigged bids on the City of Newport News school contracts.

As *Grunewald* mandates, it is the nature and scope of the conspiratorial agreement which defines the duration of the conspiracy. After determining the nature and scope of the conspiracy, we can assess whether the alleged overt act constitutes an act in furtherance of the conspiracy. Here the duration continued into the 1986-87 school year as evinced by the agreement between Pet Dairy (Stamper) and Marva Maid (Elliott). Part of the nature of the conspiracy was to supply milk during the 1986-87 school year at rigged prices. Each time milk was delivered at the rigged price, this constituted an act in furtherance of the conspiratorial agreement. In addition, each time a check was received on a rigged bid, this also constituted an act in furtherance of the conspiracy.[9] Without this continued compliance with the rigged contracts, the aims of the conspiracy would not be attained. The conspiracy contemplated a termination at the end of the school year in the summer of 1987, subject to reconfirmation. As a whole, the evidence amply supports a finding that the conspiracy continued into the limitations period.

Marva Maid makes much of Elliott's May 1986 demotion, arguing that it negates any possibility that the con-

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[9] Courts have uniformly held that the limitations period extends until either final payments are received under the illegal contracts or the illicit gains are finally distributed among coconspirators. *See United States v. Dynalectric Co.*, 859 F.2d 1559 (11th Cir. 1988); *United States v. Evans & Associates Construction Co.*, 839 F.2d 656 (10th Cir. 1988); *United States v. Northern Improvement Co.*, 814 F.2d 540 (8th Cir. 1987); *A-A-A Electric*, 788 F.2d at 245; *United States v. Inryco, Inc.*, 642 F.2d 290 (9th Cir. 1981), *cert. dismissed*, 454 U.S. 1167 (1982).

spiracy continued into the limitations period. This argument ignores Stamper's and Elliott's testimony that there was some type of 1986 reconfirmation, albeit unclear as to whether a conversation or meeting solidified the agreement. In addition, despite Elliott's demotion, Elliott testified that Neale was aware of the conspiracy and condoned the bid rigging on the part of Marva Maid. It is certainly a reasonable inference that when Neale reassumed the division manager's position on July 1, 1986, he desired to maintain continued compliance with the agreement. Neale denies any knowledge, as Marva Maid points out, but the resolution of this issue remained properly before the jury.

B

Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits contracts, conspiracies, and combinations in restraint of trade. *United States v. Gravely,* 840 F.2d 1156 (4th Cir. 1988). " 'Acceptance by competitors of an invitation to participate in a plan, the necessary consequence of which, if carried out, is a restraint of commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act, where each competitor knew that cooperation was essential to successful operation of the plan.' " *United States v. Foley,* 598 F.2d 1323, 1331 (4th Cir. 1979) (quoting 3 P. Areeda & D. Turner, Antitrust Law: An Analysis of Antitrust Principles and Their Application Paragraph 841a, at 361-62 (1978)), *cert. denied,* 444 U.S. 1043 (1980).

"To establish a violation of § 1 of the Sherman Act the prosecution need only show that [Marva Maid] willfully joined the conspiracy with intent to further some purpose of it." *Gravely,* 840 F.2d at 1161 (citing *Foley,* 598 at 1335-36). "Bid rigging" is a *per se* violation of the Act. *United States v. Portsmouth Paving Corp.,* 694 F.2d 312, 317 (4th Cir. 1982). The government is not required to establish that Elliott had a specific intent to accomplish a restraint on trade or violate the Sherman Act; rather it is sufficient for the government to establish that Elliott

"acted with knowledge of the anticipated consequences of his action." *Foley*, 598 F.2d at 1335 (citing *United States v. United States Gypsum Co.*, 438 U.S. 422, 446 (1978)). *See also United States v. Smith Grading and Paving, Inc.*, 760 F.2d 527, 533 (4th Cir.) (government need not prove specific intent in *per se* Sherman Act cases), *cert. denied*, 474 U.S. 1005 (1985); *United States v. Continental Group, Inc.*, 603 F.2d 444, 460-62 (3d Cir. 1979) (same), *cert. denied*, 444 U.S. 1032 (1980); *United States v. Brighton Building and Maintenance Co.*, 598 F.2d 1101 (7th Cir.) (same), *cert. denied*, 444 U.S. 840 (1979).

Marva Maid argues that the government failed to prove that Elliott had the necessary intent to violate the Sherman Act. This argument lacks merit because the government clearly established a violation of the Sherman Act, through the actions of Elliott on behalf of Marva Maid. Stamper and Elliott met in the spring of 1984 to discuss, in part, school milk accounts. Elliott informed Stamper that he wanted more school accounts than were currently held by Marva Maid. Stamper agreed and let Marva Maid be the low bidder for the upcoming year on the Williamsburg contract, a contract that Pet Dairy had held in the preceding school years. Pet Dairy and Marva Maid agreed further that each company would retain all other school district contracts that they presently held. To effectuate this, Pet Dairy agreed to bid higher on the upcoming bid for Williamsburg than it had the previous year, and they discussed specific minimum prices to bid. They left the meeting having agreed that Pet Dairy would bid high on certain contracts allocated to Marva Maid and that Marva Maid would bid high on certain contracts allocated to Pet Dairy. It was understood by the parties that the agreement would continue beyond 1984, subject to reconfirmation each year. They further agreed on the approximate amount of their bids to deflect any signs of collusion or bid rigging. As a result of this agreement, Marva Maid was eventually awarded the Williamsburg school contract and both Pet

Dairy and Marva Maid retained the accounts they had previously held in 1983. This agreement was reconfirmed in 1985 and 1986 for the 1985-86 and 1986-87 school years. This evidence makes it clear that Elliott formulated the necessary intent to violate the Sherman Act and Marva Maid's corporate intent was satisfied through Elliott's actions. *See United States v. Basic Construction Co.*, 711 F.2d 570, 573 (4th Cir.) (corporation criminally responsible under the Sherman Act for antitrust violations committed by employee if employee acts within the scope of his authority, or apparent authority, and for the benefit of the corporation, even if against corporate policy), *cert. denied*, 464 U.S. 956 (1983).[10]

Marva Maid contends its economic data offered at trial negates any inference that Elliott intended to violate the Sherman Act. In *Gravely*, we rejected similar arguments. There Gravely made "much of a market study prepared by a defense expert and testified to at trial that tended to negate a conclusion that the market was acting under price-fixing." *Id.* We rejected this argument in *Gravely* as specious because: (1) horizontal price-fixing was a *per se* violation of the Sherman Act, (2) a Sherman Act violation is established despite the fact that the conspiracy was unsuccessful, and (3) the subsequent meetings of the co-conspirators evinced an animus toward enforcing the agreement. *Id.* The same reasons for rejection of this argument in *Gravely* are prevalent here. First, bid rigging is a *per se* violation of the Sherman Act. Second, the fact that the conspiracy may have been unsuccessful is irrelevant. Third, the record supports that Pet Dairy and Marva Maid reconfirmed their bid rigging scheme in 1985 and 1986. Succinctly stated, the evidence as a whole supports a finding that the government proved that Elliott formulated the necessary intent to violate the Sherman Act

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[10] Indeed, Elliott testified that he knew bid rigging was illegal.

and the evidence that a violation of the Sherman Act occurred was overwhelming.[11]

V

On the basis of the checks mailed to Marva Maid by the City of Newport News in September 1986 and March 1987, the indictment charged Marva Maid with two counts of mail fraud, 18 U.S.C. § 1341, arising out of the alleged conspiracy to rig the bids on the Newport News school milk contracts. The City of Newport News school system was included in the bid rigging agreement between Pet Dairy and Marva Maid. In 1984 and 1986, there was no competition from other dairies such that the agreement between Marva Maid and Pet Dairy resulted in Marva Maid obtaining the contract without any competitive bidding. However, Elliott testified that, despite his agreement with Pet Dairy, he was forced to submit a more competitive bid in 1985 on the City of Newport News contract because other dairies competed for the contract in that year.

The mail fraud statute provides in pertinent part: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do [uses the mails], shall be fined not more than $1000 or imprisoned not more than five years, or both." 18 U.S.C. § 1341. The offense of mail fraud is established by proving a scheme to defraud the schools of money or property and the use of mails in furtherance of the scheme. *Pereira v. United*

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[11] We also find no merit to Marva Maid's arguments that the district court's jury instruction on the Sherman Act count was improper, *Smith Grading*, 760 F.2d at 533 and Part VI, *infra*, and that its bid rigging agreement to fix the price of processed milk is exempt under the Sherman Act as "state action." *Parker v. Brown*, 317 U.S. 341 (1943).

States, 347 U.S. 1, 8 (1954); *United States v. Locklear,* 829 F.2d 1314, 1318 (4th Cir. 1987) (citation omitted). The phrase " 'any scheme to defraud' is to be construed broadly." *United States v. Coyle,* 943 F.2d 424, 426 (4th Cir. 1991).

The government is also required to demonstrate that the scheme to defraud intended to deprive a victim of money or property. *McNally v. United States,* 483 U.S. 350 (1987). The government need not prove that the victim was actually deprived of money or property, rather the government need only show that the defendant intended to deprive the victim of money or property. *United States v. Ames Sintering Co.,* 927 F.2d 232, 235 (6th Cir. 1990); *United States v. Oren,* 893 F.2d 1057, 1061 (9th Cir. 1990); *United States v. Utz,* 886 F.2d 1148,1151 (9th Cir. 1989), *cert. denied,* 110 S. Ct. 3242 (1990). Under this analysis, it is sufficient for the government to meet this burden by demonstrating that the defendant intended to cause economic harm. *United States v. Martinez,* 905 F.2d 709, 715-16 (3rd Cir.), *cert. denied,* 111 S. Ct. 591 (1990).

Marva Maid claims that its mail fraud convictions should be reversed because the subject bids submitted to the City of Newport News were competitive and, thus, the City of Newport News was not deprived of money or property.[12] Marva Maid relies on *McNally.* In *McNally,* the Court reversed a mail fraud conviction under § 1341, noting that § 1341 "protects property rights, but does not refer to intangible rights of the citizenry to good government." *Id.* at 356. Thus, under *McNally,* if Marva Maid did not intend to deprive the City of Newport News of any money or property, the conviction cannot stand. In 1988, 18 U.S.C.

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[12] Marva Maid's factual predicate for this argument is somewhat misleading. Elliott testified that he submitted a more competitive bid in 1985 only because of competition other than Pet Dairy. In the years 1984 and 1986, Marva Maid submitted non-competitive bids on the Newport News school milk contract.

§ 1346 was enacted to overrule *McNally*. Section 1346 provides that a " 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." However, *McNally* applies to this case because the mail fraud conduct occurred before the enactment of § 1346, which has no retroactive application. *Accord United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991); *McEvoy Travel v. Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 791 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 536 (1991); *United States v. Davis*, 873 F.2d 900, 902 (6th Cir.),*cert. denied*, 110 S. Ct. 292 (1989).

The indictment charged that Marva Maid "devised and intended to devise a scheme and artifice to defraud the City of Newport News of money and property." J.A. 14. The jury instruction provided that in order to find the defendant guilty of mail fraud the jury must find that the defendant (1) knowingly participated in a conspiracy to deprive the City of Newport News of money or property, (2) acted with a specific intent to defraud, and (3) caused the mails to be used to further or carry out the scheme to defraud.

The government presented evidence that with each bid submitted to the City of Newport News there was an affidavit of non-collusion included. This affidavit stated in part that the bid submitted was not the result of collusion or fraud. Elliott testified that Marva Maid submitted bids knowing that the affidavit of non-collusion was false. Elliott also testified that absent the agreement with Pet Dairy the bids submitted to the school districts would have been lower. Thus, Marva Maid intentionally designed a bid rigging scheme to defraud the City of Newport News of money or property and submitted false statements to the City of Newport News in furtherance of this scheme to defraud.

Marva Maid contends that if Elliott's bids were competitive, it negates any intent to defraud. However, El-

liott's testimony was that absent the agreement with Pet Dairy, the bids he submitted would have been lower. With this in mind, the other competition in 1985 only served to curb the sizable gain that Marva Maid would derive absent the competition. The government need not prove that the scheme to defraud was successful.[13] In a light most favorable to the government, *Glasser v. United States,* 315 U.S. 60, 80 (1942), the evidence was sufficient to sustain the mail fraud convictions. There was ample evidence that Marva Maid devised a scheme to defraud the City of Newport News of money or property and used the mails to further the scheme. *Pereira,* 347 U.S. at 8; *Locklear,* 829 F.2d at 1318 (citation omitted).[14]

VI

The district court gave the following instruction tendered by Marva Maid:

> You may consider the evidence relating to the cooperative's cost, prices, profits, along with all the other evidence you have seen or heard in the trial, in determining whether or not a conspiracy existed. And if so, whether or not the cooperative was a knowing, willful member of that conspiracy.

J.A. at 693. The court then stated:

> [Y]ou may consider the evidence of price, cost and profits only as it relates to whether or not there was indeed an agreed conspiracy to submit

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[13] At its inception, the scheme to defraud intended to deprive the City of Newport News of money or property. Thereafter, Elliott decided to submit a "more competitive" bid when he became aware that other dairies were competing for the 1985-86 Newport News contract.

[14] We also find Marva Maid's contention that the district court's jury instruction on the mail fraud counts was improper to be without merit.

> rigged bids and whether the Defendant cooperative was a member thereof.
>
> If you should ultimately determine from all the evidence in the case, *including the profit income evidence,* that it has been proved beyond a reasonable doubt that such conspiracy did in fact exist and that this Defendant was a member thereof and participated therein, *then* the economic evidence of price, cost and profits is to be disregarded by you. It is no defense to illegal bid rigging when found that the prices, cost or profits were reasonable, unreasonable, high, low, fair, or unfair.

J.A. at 694 (enmphasis added). Now on appeal, Marva Maid claims that the district court erroneously instructed the jury on how it should treat Marva Maid's economic evidence. More specifically, Marva Maid argues that the district court's instruction did not allow the jury to consider the economic evidence in determining whether "Elliott . . . actually concluded or performed the bid rigging agreement now charged against Marva Maid." Appellant's Reply Brief at 12. In short, Marva Maid argues the use of the word "disregarded" by the district court resulted in an instruction that their economic evidence should be totally disregarded.

The district court admitted all of appellant's economic evidence. However, the district court correctly limited the scope of the economic evidence with a cautionary instruction as to the Sherman Act count, because while the reasonableness of prices and profits may serve to negate the *existence* of any price-fixing conspiracy (agreement), if the jury finds that a price-fixing conspiracy existed, the fact that the prices fixed were "reasonable" is no defense. *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 317 (4th Cir. 1982). As we view the instruction, it was not erroneous. The instruction allowed the jury to properly

consider whether an *agreement to rig bids between Elliott and Pet Dairy ever existed,* which is the gravamen of the Sherman Act count, and thus, the instruction did not "undermine the fundamental fairness of the trial and [result in] a miscarriage of justice." *Brasfield v. United States,* 272 U.S. 448, 450 (1926); *United States v. Polowichak,* 783 F.2d 410, 416 (4th Cir. 1986).

VII

Marva Maid argues the district court's imposition of a $1,000,000 fine on the Sherman Act count (count one) and a $50,000 fine on each of the mail fraud counts (counts two and three) was excessive, unreasonable and discriminatory. Whether a fine is excessive or unreasonable is reviewed under the abuse of discretion standard. *United States v. Harvey,* 885 F.2d 181, 183 (4th Cir. 1989). The factual findings of the district court are reviewed under the clearly erroneous standard.

Marva Maid was sentenced under the Criminal Fines Enforcement Act, 18 U.S.C. § 3622. In imposing sentence, the district court was required to apply the enumerated factors in § 3622 (now replaced by § 3572). *Harvey,* 885 F.2d at 182-83. The district court completed this task. More specifically, the district court in fashioning an appropriate sentence considered the nature of the activities, here bid rigging, Marva Maid's earnings, any burden a fine would inflict upon Marva Maid, the pecuniary loss inflicted on school districts, and the need to deprive Marva Maid of illegally obtained gains derived from its bid rigging.

Marva Maid essentially contests the district court's findings that "the pecuniary loss inflicted on the school districts . . . [is] in the hundreds of thousands," and "[t]he court has considered the amount of the fines levied in this case and believes that they will sufficiently deprive the defendant of the illegally obtained gains of its conduct."

J.A. 781-82. In its purest sense, Marva Maid argues that the profits derived from its conduct were minimal and, therefore, the district court's findings are clearly erroneous. In response, the government points to Elliott's testimony that Marva Maid's prices would have been lower absent the bid rigging. The government also introduced evidence at sentencing that the price of raw milk decreased during the indictment period, while prices of processed milk (the completed product) rose. Raw milk is the most significant cost factor in the production of processed milk. In addition, the government demonstrated that the price of milk at school facilities was 20-48% higher than the prices submitted for state facilities. Moreover, the government produced evidence at sentencing as to overcharges of $205,181 at the Norfolk school district. Finally, the government introduced evidence that milk prices to the Williamsburg school district increased considerably after Marva Maid was awarded the contract.[15]

As we view the record evidence, the district court's imposition of fines in the amount of $1,100,000 was not an abuse of discretion. The nature of Marva Maid's activities, its earnings, the pecuniary loss inflicted on school districts, and the need to deprive Marva Maid of illegally obtained gains derived from its bid rigging collectively support the fines imposed in this case.

Marva Maid claims it was erroneous to consider the Norfolk overcharge because the Norfolk school district was not named in the indictment. However, Norfolk was properly considered a victim of the offense charged in the indictment and proved at trial because the indictment states "rigging bids submitted to *certain* school boards in the Commonwealth of Virginia." J.A. at 8.

Thus, while the indictment's "means and methods" section named eleven specific school districts, not including

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[15] Other dairies who pleaded guilty to similar conduct were fined between $300,00 and $6,000,000.

Norfolk, as victims of the bid rigging conspiracy (J.A. at 9-10), this was not an element of the offense that the government needed to prove. *United States v. Miller,* 471 U.S. 130, 136, 145 (1985). So long as the government does not broaden the charges in an indictment, it may present evidence at trial of overt acts that were not specifically enumerated in the indictment. *United States v. American Waste Fibers Co.,* 809 F.2d 1044, 1046-47 (4th Cir. 1987) (indictment need not give all details of government's case or enumerate every possible legal and factual theory of defendant's guilt); *United States v. Dunningan,* 944 F.2d 178, 181 (4th Cir. 1991); *United States v. Butler,* 884 F.2d 195, 199 (4th Cir. 1989); *United States v. Stephenson,* 924 F.2d 753, 761-62 (8th Cir.); *cert. denied,* 112 S. Ct. 63 (1991). Moreover, whether or not such evidence was admitted at trial, a court can and should consider the total amount of pecuniary loss to victims of a crime when determining an appropriate sentence. *See United States v. Rothberg,* 954 F.2d 217, 219, (4th Cir. 1991) (Sentencing Guidelines case).

In short, although the district court did not determine an exact loss, it was within the district court's discretion to impose the fines it did in this case.

VIII

For the reasons stated herein, the defendant's convictions and sentences are affirmed.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-5182

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

MARYLAND AND VIRGINIA MILK PRODUCERS COOPERATIVE ASSOCIATION, INC., d/b/a Marva Maid Dairy
Defendant - Appellant

FILED
October 6, 1992

O R D E R

The appellant has filed a petition for rehearing.

THE COURT denies the petition for rehearing.

Entered at the direction of Judge Hamilton, with the concurrence of Judge Widener and Judge Stamp, United States District Judge for the Northern District of West Virginia, sitting by designation.

For the Court,
/s/ Bert M. Montague
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-5182
(CR-91-120-N)

United States of America,
Plaintiff - Appellee,

versus

Maryland and Virginia Milk Producers Cooperative, etc.,
Defendant - Appellant.

Filed:
October 27, 1992

O R D E R

The Court amends its opinion filed September 15, 1992, as follows:

On page 3, fourth full paragraph, line 4—the space in the word "low-fat" is deleted.

On page 7, first full paragraph, line 7—a space is added between the words "records" and "from."

On page 14, first paragraph, line 2; and page 18, first full paragraph, line 8—the capitalization in the phrase "see also" is deleted.

On page 15, lines 2 and 3 of indented quotation; page 16, line 8 of indented quotation; and page 17, lines 2, 7, and 11 of the second paragraph of the indented quotation—the single quotation marks are replaced with double quotation marks.

On page 16, second full paragraph, lines 5 and 10—a section mark is added after "18 U.S.C." and before the section number.

On page 19, first full paragraph, line 4—the hyphen in the word "statements" is deleted.

For the Court - By Direction
/s/ Bert M. Montague
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-5182

MARYLAND AND VIRGINIA MILK PRODUCERS COOPERATIVE ASSOCIATION, INC. D/B/A MARVA MAID DAIRY,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

FILED:
February 20, 1992

O R D E R

I do not have the record in this case and have gleaned the following factual information from the papers submitted to me by the attorneys, some of which may not be supported by the record, but I doubt that many of the facts I recite will not be, the attorneys appearing to be responsible.

After the conviction of the defendant in this case, the defendant having from time to time throughout the trial sought statements made by the government's principal witness, Elliott, to the government's attorney as well as others, in response to a motion to set aside the verdict the government offered to deliver to the district court for its *in camera* inspection notes taken by the attorneys in a series of interviews commencing April 2, 1987 and ending some time after September 18, 1991.

The district court, following this offer by the government, requested that the said notes be delivered to it for examination but neither the district court nor the government notified the defendant that such was taking place. The notes were delivered to the district court under cover letter dated October 24, 1991, a copy of which letter was not sent to the defendant. Thus, the defendant was not aware that the district court had examined the said notes until it received the district court's order denying the defendant's motion to set aside the verdict.

The defendant has noted its appeal, and I have before me a motion of the defendant pursuant to Fed. R. App. P. 10(e) to make the said notes a part of the record on appeal (an implicit request to examine the said notes) as well as a motion seeking an order requiring the government to reconstruct the unrecorded communications between it and the district court. As to the latter motion, I believe that the factual summary I have recited above reconstructs the communications between the government and the district court. If the defendant takes any exception to such reconstruction, it may note the same in its brief. I, therefore, hold that motion to be moot.

I have, by letter from our clerk to the government, required the said notes to be delivered to me for examination, and the government has delivered a facsimile copy of the same. Not only is an examination of the notes necessary for a decision on the defendant's motion to make them a part of the record, the same is clearly contemplated by 18 U.S.C. § 3500(c). Indeed, in its response to the instant motion the government does not oppose submitting the notes to this court under seal, provided that they not be disclosed to the defendant unless and until it is determined on the merits that the defendant is entitled to see them. The district court, having examined the notes, stated it found no evidence whatsoever to support the defendant's allegations, apparently referring to the recitation in its order of denial of access to the notes and especially a

claim of coaching by the government's attorneys. Its denial of access to the notes was based on that finding and the attorney client privilege as stated in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The district court apparently did not examine the notes with reference to the Jencks Act, 18 U.S.C. § 3500, or the case of *Goldberg v. United States*, 425 U.S. 94 (1976). Expressing no present opinion on the merits, I suggest that the application of *Goldberg* and the cases following it may well be controlling.

My examination of the notes reveals, as a preliminary matter subject to re-examination by the panel which hears the case, that the notes are in fact statements made by the witness Elliott to certain United States attorneys which may or may not have been made in the presence of government investigators and others, as well. The notes do "relate [. . .] to the subject matter as to which the witness [Elliott] . . . testified." 18 U.S.C. § 3500(b). For the purposes of briefing and argument on this appeal, that fact should be taken as a given by the parties unless the United States shows that it is incorrect, which will be done no later than its brief.

What the papers before me do not show, however, is whether the said statements of the witness Elliott, which were not signed, have been "otherwise adopted or approved by him." 18 U.S.C. § 3500(e)(1). This is a question which must be addressed on appeal, if the defendant wants to pursue the matter, and the parties should direct their attention to the same in their briefs. Other matters so requiring the attention of the parties with respect to this subject are whether the defendant had an obligation during the trial to show such adoption or approval of the said notes and to what extent, if any, the district court had an obligation upon the defendant's request for said notes to inquire into the existence and content of the same and make suitable fact finding. Those also are matters to which the parties should give their attention in this appeal. Because the defense need not have access to the notes to

argue these issues, it having prevailed for the moment on the question of the subject matter of the notes, the defendant's motion under Fed. R. App. P. 10(e) will be granted, but access to the notes will be denied the defendant until the further order of this court.

It is accordingly ADJUDGED and ORDERED that the briefing of the parties will comply with the directions in this order and that the said notes will remain in the possession of this court, under seal, for its use during the pendency of the appeal and until the further order of this court.

It is FURTHER ORDERED that the said motion to reconstruct the unrecorded communications shall be, and the same hereby is, dismissed as moot.

/s/ H. E. Widener, Jr.
United States Circuit Judge

A True Copy: Teste:
John M.Greacen, Clerk
By /s/ Cheryl Williamson
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Criminal 91-120-N

United States of America,

v.

Maryland and Virginia Milk Producer Cooperative Association, Inc., d/b/a Marva Maid Dairy

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FILED
SEP 19, 1991

OPINION AND ORDER

Maryland and Virginia Milk Producers Cooperative Association Inc., d/b/a Marva Maid Dairy, ("Marva Maid"), the defendant herein, is charged in a criminal indictment with one count of criminal antitrust conspiracy in violation of the Sherman Act, 15 U.S.C. § 1, two counts of mail fraud in violation of 18 U.S.C. § 1341 and one count of making a false statement in violation of 18 U.S.C. § 1001. Marva Maid entered a plea of not guilty at arraignment and subsequently moved this court to dismiss the indictment on various grounds. For the reasons set out below, the motion of the defendant is DENIED.

BRIEF FACTS

This case arises out of a Department of Justice investigation into bid rigging by the milk industry. On July 30, 1991, the defendant was indicted by grand jury and

charged with the [sic] having committed the crimes set out above . In short, the government alleges that the defendant conspired with several other milk companies to rig the bidding process for the procurement of milk by school districts. Specifically, the government alleges that the defendant, through its former Division Manager, met with officials of Pet Dairy and conspired to "divide up" various contracts for supplying milk to local school districts. The government further alleges that the parties than [sic] carried out the scheme and were awarded various contracts to provide milk to the school districts.

The defendant filed a motion to dismiss the indictment alleging, inter alia, that the government's pre-indictment delay severely prejudiced its case. Particularly, the defendant claims that it was the subject of a 1986 grand jury investigation which concluded without indictment. During that earlier investigation, the government subpoenaed, and the defendant produced, numerous documents relating to its bidding procedures. In February 1988, following the investigation, the government returned the documents to the defendant. The documents in question were placed in four boxes and stored by the defendant in various places. In May 1990, the defendant was again served by the grand jury with a subpoena requesting that it produce various documents relating to its bidding procedures. While attempting to comply with the later subpoena, the defendant discovered that the [sic] one of the four boxes of documents that had earlier been returned was missing and was ". . . most likely lost or destroyed." Defendant's Omnibus Motion to Dismiss at 4. As a result of the loss of these documents, the defendant claims that its case is severely prejudiced.

In addition to moving to dismiss the entire indictment as a result of allegedly prejudicial pre-indictment delay, the defendant claims that the mail fraud and false statement claims must be dismissed because the conduct alleged by the Government is insufficient to sustain a conviction.

DISCUSSION

A. PRETRIAL DELAY

To prevail in its motion to dismiss on the ground that there was a prejudicial prosecution delay, the defendant must prove 1) that the Government delayed indicting the defendant and 2) that such delay severely prejudiced the defendants ability to defend itself. The defendant has failed to demonstrate either. As a result, the motion to dismiss must fail.

The defendant must prove that the government delayed the indictment of the defendant either with the purpose of obtaining tactical advantage or with reckless disregard as to whether the defendant was disadvantaged. *United States v, Marion*, 404 U.S. 307 (1971). The defendant has demonstrated neither. While it is true that the defendant was the subject of an earlier investigation, there is no evidence to suggest that the government could have obtained an indictment based on that earlier investigation. In fact, the earlier investigation focused on a different aspect of the milk industry's business. There is simply no evidence in the record to support the defendant's claim that the government delayed prosecuting this case.

The defendant suggests that the earlier investigation caused its managers and lawyers to develop a false sense of security as to the legality of its bidding operations or the potential for future prosecution. Such an earlier investigation does not, however, deprive the defendant of due process if the government initiates prosecution after having received new information. This is particularly true with respect to the facts in this case. Indeed, the offense charged in this case has a statute of limitations which does not expire until September 1992. That statute of limitations provides the defendant with a predictable, legislatively approved, time after which it may rest assured that it will not face prosecution. *Id.* at 320-23. Only in rare instances will the delay which falls within the statute of

limitations be a violation of due process. This is not such a case.

In addition to proving that the government delayed prosecuting the defendant, the defendant must prove that it was severely prejudiced as a result of that delay. *United States v. Automated Medical Laboratories*, 770 F.2d 399, 403 (4th Cir. 1985). Here again, the defendant fails to meet its burden. Any prejudice to the defendant's ability to conduct its defense is a result of its own negligence in caring for its business records. The defendant admits that it either lost or destroyed the records which are missing and it makes no allegation whatsoever that the government was involved in that loss or destruction. Hence, the defendant has no claim that the government delay resulted in prejudice to its case.

B. MAIL FRAUD

The government contends that the defendant used the United States Mail as part of the alleged scheme to rig the bids for various school milk contracts. To prevail against a motion to dismiss, the government must allege the conduct necessary to sustain a conviction for the offense charged. *Hamling v. United States*, 418 U.S. 87, 117-18 (1974). To sustain a conviction for mail fraud, the government must allege 1) that the defendant participated in a scheme to defraud; and 2) that the defendant used, or caused to be used, the mails for the purpose of executing the scheme. *Pereira v. United States*, 347 U.S. 1 (1954). The government has made such allegations in the indictment. In considering the defendant's motion to dismiss, this Court must accept the allegations in the indictment as written. *United States v. Lattimore*, 215 F.2d 847 (D.C. Cir. 1954). Therefore, the motion to dismiss must be denied.

The defendant claims that any scheme to rig the bids involved in this case was complete once the bids were unsealed and the contracts were awarded. In support of

this position, the defendant cites *United States v. Maze*, 414 U.S. 705 (1989). *Maze* involved a defendant convicted of mail fraud after having used a stolen credit card to obtain services at various hotels. The alleged mailing for which he was convicted involved the mailing of the credit card slips to the member banks by the hotel which had provided the services. The Court reversed the conviction and held that the fraudulent scheme reached fruition when the illegal charges were made and that the mailings were irrelevant to the scheme's ultimate success. *Id.* at 402. The defendants reliance on this case is clearly misplaced.

The defendant in *Maze* was unconcerned with the subsequent mailing of the charge slips. Indeed, the scheme to defraud the hotel was complete once the defendant presented the charge card and received the services. The facts in this case are inapposite. The success of the bid rigging scheme in this case depended on the alleged riggers' being paid for their milk. Unlike the defendant in *Maze*, the defendant in this case allegedly relied on the United States Mail to receive the monies that it earned in its allegedly fraudulent scheme. That is, the alleged scheme was not complete until the defendant was paid. Furthermore, courts have routinely held that bid rigging conspiracies constitute schemes to defraud and "can be prosecuted simultaneously as Sherman Act and mail fraud violations." *United States v. Rodgers*, 624 F.2d 1303, 1310 n. 17 (5th Cir. 1980), *cert. denied* 450 U.S. 917 (1981); *United States v. Brighton Building & Maintenance Co.*, 598 F.2d 1101 (7th Cir. 1979), cert. denied 444 U.S. 840 (1979); *United States v. Wishita Construction Co.*, 789 F.2d 809 (10th Cir. 1988). Therefore, the motion to dismiss counts two and three of the indictment charging mail fraud must fail.

C. FALSE STATEMENTS

The indictment charges that the defendant made a false statement in violation of 18 U.S.C. § 1001. As noted above, to prevail against a motion to dismiss, the government

must allege the conduct necessary to sustain a conviction for the offense charged. *United States v. Norris*, 749 F.2d 1116 (4th Cir. 1985), *cert. denied*, 471 U.S. 1065 (1985), sets out the three elements of § 1001:

1. Making and using or causing the making or using of a false writing or document as a material fact in relation to a matter within the jurisdiction of the United States.
2. Doing the act knowing at the time that the writing or document was false, fictions or fraudulent, and
3. Doing the act knowingly and willfully.

The indictment in this case charges the defendant with each of these elements. In considering a motion to dismiss, the court must accept the allegations in the indictment. Therefore, the motion to dismiss must be denied.

The defendant claims that its alleged false statements were not made in relation to a matter within the jurisdiction of an agency of the United States. Instead, the defendant claims that any alleged false statements affected only local governmental agencies. As such, the defendant claims, the grand jury's indictment on this charge must be dismissed.

To be convicted under 18 U.S.C. § 1001, the defendant need not have made a false statement directly to a federal agency. *United States v. Herring*, 916 F.2d 1543 (11th Cir.) *cert. denied*, 111 S. Ct. 2248 (1991); *United States v. Oren*, 893 F.2d 1057, 1064 (9th Cir. 1990); *United States v. Notarantonio*, 758 F.2d 777 (1st Cir. 1985). Rather, it is sufficient if the false statement concerns an official authorized function of a federal agency. The government claims that the false statement alleged in this case concerns the Department of Agriculture and its administration of the federal school lunch program. Specifically, the government contends that the Department of Agriculture supervises the procurement of school milk through its school

lunch program. The rules promulgated for such supervision require that the procurement of milk shall be in a manner that provides maximum open and free competition. 7 C.F.R. § 3015.182. The alleged false statement in this case corrupts the procurement process and causes the school districts involved to violate the federal regulations. Therefore, it is clear that the alleged false statement, if proved, would constitute a violation of 18 U.S.C. § 1001. Hence, the motion to dismiss must fail.

CONCLUSION

The defendant has failed to demonstrate either 1) that the government delayed indicting the defendant in this case, or 2) that the alleged delay caused the defendant to be severely prejudiced. In addition, the defendant's claim that the allegations in the indictment are insufficient to sustain a conviction is simply without merit. Therefore, the defendants motion to dismiss the indictment is DENIED.

/s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia
September 19, 1991

A TRUE TESTE:
Doris R. Casey, Clerk
by /s/ [illegible]
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Criminal 91-120-N

UNITED STATES OF AMERICA

v.

MARYLAND AND VIRGINIA MILK PRODUCERS COOPERATIVE ASSOCIATION, INC., d/b/a MARVA MAID DAIRY

FILED NOV 8 1991

OPINION AND ORDER

INTRODUCTION

On September 27, 1991, the Maryland and Virginia Milk Producers Cooperative Association, Inc., d/b/a Marva Maid Dairy ("Defendant"), was convicted by a jury of one count of conspiring to rig school milk bids in violation of 15 U.S.C. § 1 and two counts of mail fraud in violation 18 U.S.C. § 1341. During the week long trial, the jury heard evidence that the Defendant, through its employee Charles Elliot, met with officials of Pet/Land-O-Sun Dairies ("Pet") and agreed to rig the bidding process of various school districts in the Eastern District of Virginia.

Defendant now seeks a retrial claiming that it was denied a fair trial as a result of errors committed by the court. Specifically, the defendant claims that: 1) the court improperly refused to order the Government to produce

the notes of its interviews with witness Charles Elliot; 2) the Government failed to prove Marva Maid's intent to cause economic harm and the Court improperly failed to instruct the jury that such intent must be proved beyond a reasonable doubt; 3) the cautionary instruction given by the Court to the jury regarding economic evidence introduced by the Defendant was unnecessarily confusing and prejudicial and 4) the court improperly refused to instruct the jury on the Capper-Volstead Act. We find the Defendant's arguments entirely without merit and for the reasons set out below, the defendants motion for a new trial is DENIED.

I

The Defendant's first claim of error is that it did not receive a fair trial because it was denied access to the Government's notes taken during interviews with Charles Elliot, a Government witness at trial. In describing its need for the notes, the Defendant suggests that Mr. Elliot's testimony was the product of "coaching" by Government attorneys. In support of this position, the Defendant points out the large number of hours that the Government attorneys spent interviewing Mr. Elliot.

The Defendant's position is simply without basis in fact or law. The court has reviewed the Government's notes *in camera* and has found no evidence whatsoever to support the Defendant's allegations. Moreover, the law requires more than mere allegations of the potential for misconduct before attorney's notes are turned over to opposing parties. The Supreme Court in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), held that there must be an even greater showing than substantial need before opposing parties will be entitled to notes prepared by one another in anticipation of trial. The unsubstantiated allegations in this case do not rise to such a level. Therefore, the Defendant was not entitled to the Government's

notes and the Court's refusal to order the notes to be turned over to the Defendant was proper.

II

The Defendant's second claim of error concerns the mail fraud counts of the indictment. The Defendant claims that the government failed to prove intent to cause economic harm and that the Court failed to instruct the jury of the need to prove such intent beyond a reasonable doubt. In support of its position, the Defendant cites *McNally v. United States*, 483 U.S. 350 (1987), which overturned a mail fraud conviction based on a jury instruction that allowed the jury to convict without finding that the defendant defrauded the victim of money or other tangible property.

The mail fraud instruction given to the jury in this case was correct and supported by the case law. The court instructed the jury that to convict the Defendant it must find:

> First, that the defendant knowingly participated in a scheme to defraud *as alleged in the indictment*. Secondly, that the defendant acted with a specific intent to defraud, and third, that the defendant used the mails or caused the mails to be used to further or carry out the scheme to defraud.

Tr. at 1053 (emphasis added).

With respect to the mail fraud counts, the indictment alleged that the Defendant "... devised and intended to devise a scheme and artifice to defraud the City of Newport News of money and property ..." Therefore, contrary to the contentions of the Defendant, the jury was instructed of the need to find that the Defendant intended to defraud Newport News out of money or property.

Similarly, the conviction is supported by the facts of this case. The statute states that:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . knowingly causes to be delivered by mail . . . any . . . matter or thing shall be fined . . .

18 U.S.C. § 1341. The evidence at trial clearly supported the Defendant's conviction under the statute. Specifically, the evidence demonstrated that the Defendant and Pet arranged to rig the Newport News school milk bid so that Pet's bid would be higher than the bid submitted by the Defendant. Furthermore, the Defendant's bid contained a noncollusion clause which stated that the defendant's bid was not a product of fraud or collusion. The evidence clearly demonstrates that the Defendant intended to win the bid through use of fraud and/or false pretenses and thereafter receive payment for the bid through the mails. Therefore, the Defendant's conviction was fully supported by the evidence.

III

Prior to allowing the Defendant to introduce economic evidence to support its contention that no illegal conspiracy took place, the court instructed the jury as to the use of that evidence. Specifically, the court instructed the jury that with respect to Count I of the indictment the economic evidence was only relevant as to whether or not there was a conspiracy. Further, the court admonished the jury that they were to disregard the evidence with respect to Count I if they found that a conspiracy existed. The Defendant claims that it was prejudiced by the cautionary instruction with respect to the mail fraud counts. The Defendant's argument here is without merit. In cautioning the jury with respect to the use of certain economic evidence the Court clearly indicated that the instruction was applicable only to Count I of the indictment. The court in giving its instruction to the jury stated:

> The cautionary instruction I make to you is only with regard to Count I . . . In your consideration of the charge of conspiracy . . . in Count I—we're not talking about II, III or IV—you may consider the evidence of price . . .

Tr. at 674-675. In addition, the cautionary instruction, as given, was a correct statement of the law and was necessary to prevent the jury from being confused about the applicability of the evidence. *United States v. MMR Corporation*, 907 F. 2d 489, 498 (5th Cir. 1990).

IV

The Defendant's final claim is that Count I of the indictment was barred by the Capper Volstead Act, 7 U.S.C. §§ 291-2 and the "state action" doctrine. Such a claim, given the facts of this case, is patently ridiculous. The Capper Volstead Act applies only to combinations of farmers (such as cooperatives) and other exempt entities. *Alexander v. National Farmers Organization*, 687 F.2d 1173, 1182 (8th Cir.) *cert. denied* 461 U.S. 937 (1981). Pet is not a cooperative. Hence, it is clearly a non-exempt entity and therefore, the Capper Volstead Act is inapplicable. *Id.*

Defendant's reliance on the "state action" doctrine is equally without merit. The Defendant contends that it is exempt from antitrust liability as a result of being regulated by the Virginia Milk Commission. That is, the Defendant claims that the Commonwealth of Virginia has a clearly articulated and affirmatively expressed policy sanctioning the defendant's conduct. Defendant's Memorandum of points and Authorities in Support of Motion For Judgment of Acquittal at 3 *et seq.* Such a claim is ludicrous and is in direct opposition to the Defendant's own evidence. The Defendant's own witness, Charles H. Coleman, administrator of the Virginia Milk Commission, testified that the agreement between Pet and the Defendant was clearly not permissible under the Com-

monwealth's statutes regulating the milk industry. Tr. at 698, 670. Hence, any claim that the Defendant's conviction is barred by the "state action" doctrine must fail.

Finally, the Defendant claims that the court erred by failing to give the jury an instruction on the Capper Volstead Act or the "state action" doctrine. As set out above, neither of those defenses were meritorious. Any instruction given to the jury in this regard would have only served to unnecessarily confuse the jury. The Court, therefore, correctly refused to give the jury an instruction on the Capper Volstead Act or the "state action" doctrine.

CONCLUSION

For the reasons set out above, the Defendant's motion for a new trial is DENIED.

/s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia
November 8, 1991
A TRUE COPY TESTE:
Doris R. Casey, Clerk
By /s/ Marian Newton
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CR. 91-120-N—01

UNITED STATES OF AMERICA

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS COOPERATIVE ASSOCIATION, INC. d/b/a MARVA MAID DAIRY

O R D E R

On this 12th day of November, 1991, came the attorneys for the government and the defendant company was represented by Messrs Hunter W. Sims, Patrick H. O'Donnell & Edward L. Merrigan.

IT IS ADJUDGED that the defendant corporation, MARYLAND AND VIRGINIA MILK PRODUCERS COOPERATIVE ASSOCIATION, INC., d/b/a MARVA MAID DAIRY, has been convicted after a Jury Trial and upon a finding of Guilty of the offense of violation of Title 15 U.S.C. §1 (Sherman Act) and violation of Title 18 U.S.C. §1341 (Mail Fraud) as charged in the Indictment; and the court having asked if there was any reason why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant corporation is guilty as charged in Counts 1, 2, and 3 of the Indictment.

IT IS ADJUDGED that the defendant corporation shall pay a FINE in the amount of $1,000,000.00 re Count 1; $50,000.00 re Count 2; and $50,000.00 re Count 3.

The defendant corporation shall further pay an ASSESSMENT in the amount of $200.00 as to each of Counts 1, 2 & 3 for a total assessment of $600.00.

On motion of the defendant corporation, Count 4 of the Indictment was dismissed on September 27, 1991.

IT IS SO ORDERED.

/s/ John A. MacKenzie
John A. MacKenzie, U.S. District Judge

Norfolk, Virginia
November 12, 1991

FIFTH AMENDMENT

"AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived or life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

* * *

SIXTH AMENDMENT

"AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

* * *

THE SHERMAN ACT

15 U.S.C. § 1

"§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . . ."

* * *

MAIL FRAUD STATUTE

18 U.S.C. § 1341

"§ 1341. Frauds and swindles

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. . . ."

STATUTE OF LIMITATIONS

18 U.S.C. § 3282

CHAPTER 213—LIMITATIONS"

"§ 3212. Offenses not capital

"Except as otherwise expressly provided by law, no person shall be prosecuted, tried or punished for any offense,

not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

* * *

THE JENCKS ACT

18 U.S.C. § 3500(b)-(e)

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this

section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsection (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however, taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

[seal]

Memorandum

Grand Jury Investigation of Military
Milk Procurement in Norfolk/Tidewater:
Recommendation to Close

Date: January 27, 1988
60-2026-0001

To Anthony V. Nanni
Chief, Litigation I Section

From: Gail Kurah
Terrence McDonald
Joseph Allen

On June 25, 1986, we were authorized to empanel a grand jury in the Eastern District of Virginia to investigate possible bid rigging by milk suppliers to the *military* in the Norfolk/Tidewater (Virginia) area. The investigation was based upon a suspicious bidding pattern on milk contracts for *military* installations in Norfolk/Tidewater. Essentially, the bid documents suggests an allocation scheme whereby the main bidders won the same contracts each six months and bid higher on the other contracts, resulting in each dairy obtaining a relatively equal share of the military milk sales. After about seven months of active grand jury investigation, however, we were unable to obtain sufficient evidence of bid rigging to recommend an indictment or even justify further investigation. We therefore recommend closing the investigation.

In July 1986, grand jury document subpoenas were issued to four dairies: Birtcherd Dairy, Norfolk; Miller's Dairy, Norfolk; Marva Maid Dairy, New Port News;[1] and Curles Neck Farm and Dairy, Richmond. There were five grand jury sessions, with the last session in June 1987. All of the individuals from the four dairies with any bid-

[1] Marva Maid is part of the Maryland and Virginia Milk Producers Cooperative Association, Inc. Also, on May 10, 1986, the Maryland and Virginia Milk Producers Cooperative Association purchased Birtcherd Dairy.

ding responsibility, as well as their subordinates, testified without immunity before the grand jury. None admitted to bid rigging on military, *school* or any other dairy contracts or even to communicating with their competitors about such contracts before they were bid.

The *only* lead in this investigation came from Charles Elliott, former General Manager of Marva Maid. In a proffer interview, Elliott explained that he replaced Thomas Neale as General Manager of Marva Maid in September 1983, although Neale stayed on as a consultant and continued to prepare the military bids. Elliott signed the blank military bids and then turned them over to Neale for completion. Elliott said that his evaluation of Marva Maid's profits and costs on the military contracts led him to conclude that the bids were rigged. Elliott pointed out that Marva Maid's prices to the military were higher than its commercial prices, yet its overall costs for military contracts were lower. Also, Elliott said that in luncheon discussions with Thomas Neale, Neale would comment that he had to get together with T.C. Hawkins, former Vice President of Birtcherd Dairy, to discuss the Navy contracts. Neale also made similar references about Vernon Benjaminson, Vice President/General Manager of Miller's Dairy. Finally, according to Elliott, Neale alluded to telephone conversations with John Campbell, President of Curles Neck Farm and Dairy

* * * *

There are several problems with Elliott's proffer. First, Elliott recently was fired from Marva Maid and has a clear axe to grind against both the company and Neale. More significantly, however, we have been unable to obtain any

* * * *

corroboration of Elliott's allegations of bid rigging, other than our initial bid analysis. Elliott did not participate in any collusive meeting or conversation; all of his knowledge

allegedly comes from Neale. As noted at the outset, Neale, T.C. Hawkins, Benjaminson, Campbell, as well as the other major players, testified before the grand jury and flatly denied any participation in or knowledge of bid rigging.

* * * *

In sum, with the exception of Elliott's allegations, we have no proof of bid rigging or any other antitrust violations. Since we see no other avenues of inquiry at this time, we recommend closing the investigation.[5]

U.S. Department of Justice

Antitrust Division

[seal]

AVN:TFM
60-5143-0003

Judiciary Center Building
555 Fourth Street, N.W.
Washington, DC 20001

August 28, 1991

By Hand
William O. Bittman, Esq.
Reed Smith Shaw & McClay
1200 18th St., N.W.
Washington, D.C. 20036
Fax No.: (202) 457-6113

R: United States v. Maryland and Virginia Milk Producers Cooperative Association, Inc., E. D. Virginia, Norfolk Division, Crim. No. 91-120-N

Dear Mr. Bittman:

The following is provided to you as information possibly favorable to the defendant under *Brady v. Maryland*, 373 U.S. 83, (1963):

> During an interview with Department of Justice attorneys, an agent from the Naval Investigative Service and an agent from the Defense Criminal Investigative Service on April 2, 1987 at the office of the U.S. Attorney in Norfolk, Virginia, Charles Elliott stated that he had no basis to believe there had been collusion on school bids.

We recognize our continuing duty to provide information to the defendant that may possibly fall within *Brady*.

Sincerely,

/s/ Terrence F. McDonald
Terrence F. McDonald
Attorney
Litigation I

8427R

U.S. Department of Justice

Antitrust Division

[seal]

AVN:TFM
60-2026-0001

Judiciary Center Building
555 Fourth Street, N.W.
Washington, DC 20001

March 25, 1987

EXPRESS MAIL

Wayne Lustig, Esquire
Guy, Cromwell, Betz & Lustig
5th Floor, Pembroke One Building
281 Independence Boulevard
Virginia Beach, Virginia 23462

Re: Dairy Products Grand Jury Investigation—Eastern District of Virginia—Norfolk Division

Dear Mr. Lustig:

You have indicated that your client, Charles T. Elliott, is willing to make himself available to the staff conducting the above-captioned investigation for an interview and for testimony before the grand jury in which he will provide all information in his possession which may asist the grand jury investigation upon the basis hereinafter set forth.

1. A grand jury in the Eastern District of Virginia is investigating suspected bid rigging and collusion among dairies which may involve felony violations of federal antitrust laws and other federal laws.

2. Mr. Elliott has consulted thoroughly with counsel of his own choosing before agreeing to grant this interview. Mr. Elliott's counsel shall have the right to be present throughout the interview and Mr. Elliott may consult with his counsel in private at any time during the interview.

3. Mr. Elliott has been informed and understands that neither he nor his counsel has been promised: (a) that Mr. Elliott will be called as a witness before any federal grand jury; or (b) that Mr. Elliott will not be prosecuted, except as set forth in paragraph five below.

4. The United States agrees that no statement made by Mr. Elliott during the interview will be used directly or indirectly against him in any legal proceeding, except in a prosecution for making a false statement, perjury, or obstruction of justice or to impeach his testimony. The United States agrees that Mr. Elliott will not otherwise be deemed to have waived his Fifth Amendment rights by consenting to the interview.

5. If the United States decides to call Mr. Elliott as a witness before the grand jury, it will obtain an order to compel his testimony subject to the immunity provisions provided in 18 U.S.C. § 6001 *et seq.* However, the decision to call Mr. Elliott before the grand jury rests solely within the discretion of the United States.

If these terms and conditions for the interview are satisfactory to you and Mr. Elliott, and accurately reflect your understanding of the basis upon which the interview will be conducted, please acknowledge your agreement to them by signing the acknowledgment below.

This letter constitutes the entire understanding between the United States, Mr. Elliott, and his counsel. Your signatures below signify your acceptance of the foregoing conditions governing the interview.

Sincerely,

/s/ Terrence F. McDonald
Terrence F. McDonald
Attorney, Litigation I
Antitrust Division

ACKNOWLEDGEMENTS

I, Charles T. Elliott, have read the above agreement in full; I have consulted with legal counsel of my own choosing regarding its significance; and I agree to this interview on the terms and conditions set forth above.

March 30, 1987
Date

/s/ Charles T. Elliott
Charles T. Elliott

I, Wayne Lustig, have read the above agreement in full; I have consulted with my client, Charles T. Elliott, regarding its significance; and I have advised him to grant this interview on the terms and conditions set forth above.

March 30, 1987
Date

/s/ Wayne Lustig
Wayne Lustig
Counsel for Charles T. Elliott

U.S. Department of Justice

Antitrust Division

[seal]

AVN:DCJ
60-5143-0003

Judiciary Center Building
555 Fourth Street, N.W.
Washington, D.C. 20001

January 25, 1991

Franklin A. Swartz, Esquire
Rabinowitz, Rafal, Swartz & Gilbert, P.C.
Wainwright Building, Suite 750
229 West Bute Street
P.O. Box 3332
Norfolk, Virginia 23514

Re: Grand Jury Investigation—E.D. Virginia Milk and Dairy Products

Dear Mr. Swartz:

This letter sets forth our agreement concerning the basis upon which your client, Charles T. Elliott, will make himself available for an interview in connection with an antitrust grand jury investigation of the milk industry in the Eastern District of Virginia.

1. Mr. Elliott has freely chosen you as his counsel and has consulted thoroughly with you before agreeing to the interview. As Mr. Elliott's counsel, you will have the right to be present throughout the interview, and Mr. Elliott may consult with you in private whenever he desires. Mr. Elliott may terminate the interview at any time and may decline to answer any question asked.

2. Mr. Elliott has been informed and understands that neither he nor his counsel has been promised; (a) that Mr. Elliott will not be prosecuted; or (b) that Mr. Elliott will receive any form of immunity from prosecution.

3. The United States agrees that no statement made by Mr. Elliott during the interview will be attributed to him in any legal proceeding, except that his statements may be be offered to impeach his testimony in such a proceeding. The United States is free to use leads derived from the interview to pursue its investigation and any subsequent prosecution of Mr. Elliott or others. The United States agrees that Mr. Elliott will not otherwise be deemed to have waived his Fifth Amendment rights by consenting to the interview.

4. If, in the judgment of the Antitrust Division staff conducting the interview, Mr. Elliott is fully truthful and candid in the interview and the staff is satisfied that he has disclosed all the information in his possession that may assist the grand jury investigation, the staff will recommend to their superiors that Mr. Elliott's testimony be compelled pursuant to 18 U.S.C. § 6001 *et seq.*

5. This letter constitutes the entire understanding between the United States, and you and Mr. Elliott. Your signature and he signature of Mr. Elliott below indicate acceptance of the terms of the interview described in this letter.

Sincerely,

/s/ David C. Jordan
David C. Jordan
Attorney
Antitrust Division

/s/ Franklin A. Swartz — Dated: 1-28-91
FRANKLIN A. SWARTZ, ESQUIRE

/s/ Charles T. Elliott — Dated: 1-28-91
CHARLES T. ELLIOTT

(5435R)

U.S. Department of Justice

Antitrust Division

[seal]

AVN:TFM
60-5143-0003

Judiciary Center Building
555 Fourth Street, N.W.
Washington, DC 20001

July 22, 1991

Franklin A. Swartz, Esquire
Rabinowitz, Rafal, Swartz & Gilbert, P.C.
Wainwright Building, Suite 750
229 West Bute Street
P.O. Box 3332
Norfolk, Virginia 23514

Re: Grand July Investigation—E.D. Virginia Milk and Dairy Products

Dear Mr. Swartz:

Your client, Charles T. Elliott, has provided certain information to the United States in connection with the above-referenced investigation. This information, or any information directly or indirectly derived from such information, will not be used against Mr. Elliott in any criminal case, except in a prosecution for perjury or giving a false statement. The information will be treated as if compelled by Court Order pursuant to 18 U.S.C. § 6001 *et seq.*

Sincerely,

/s/ Terrence F. McDonald
Terrence F. McDonald
Attorney
Litigation I

8116R

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CRIMINAL NO. 91-120-N

UNITED STATES OF AMERICA

v.

MARYLAND AND VIRGINIA MILK PRODUCERS COOPERATIVE ASSOCIATION, INC., d/b/a MARVA MAID DAIRY,
Defendant.

ORDER OF USE IMMUNITY FOR TRIAL TESTIMONY

The United States of America by its attorney, Kenneth E. Melson, United States Attorney for the Eastern District of Virginia, and Laura M. Everhart, Assistant United States Attorney for the Eastern District of Virginia, having moved the Court for an Order requiring CHARLES T. ELLIOTT to testify pursuant to Title 18, United States Code, Sections 6002 and 6003, in regard to a trial styled *United States v. Maryland and Virginia Milk Producers Cooperative Association, Inc., d/b/a Marva Maid Dairy*, Criminal Number 91-120-N, and to provide such information at any other proceeding ancillary to the above-styled matter, and being advised that the request for immunity was approved by the Assistant Attorney General of the Criminal Division, United States Department of Justice on September 17, 1991, and that the testimony and other information from this witness may be necessary to the public interest, and furthermore, such individual is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination, it is hereby

ORDERED, ADJUDGED and DECREED that CHARLES T. ELLIOTT be required to testify and provide other in-

formation in regard to the above-styled trial, and to provide such information at any other proceeding ancillary to the above-styled matter.

Provided, that the said CHARLES T. ELLIOTT is hereby granted immunity from the use against CHARLES T. ELLIOTT in any criminal case of any testimony or other information compelled under such order, or any information directly or indirectly derived from such testimony or other information, except that the above does not immunize the said CHARLES T. ELLIOTT against charges of perjury, giving a false statement or otherwise failing to comply with the Order of Court.

/s/ John A. MacKenzie
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

Date: September 19, 1991

I ask for this:

KENNETH E. MELSON
UNITED STATES ATTORNEY

By: /s/ Laura M. Everhart
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CRIMINAL ACTION NO. 92-25-N

UNITED STATES OF AMERICA

v.

JOSEPH C. HUGHES,

Defendant.

TRANSCRIPT OF PROCEEDINGS
Norfolk, Virginia
April 21, 1992
VOLUME IIB

Before:

HONORABLE ROBERT G. DOUMAR,
United States District Judge

* * * *

that paragraph, please?

THE COURT: What paragraph was it?

MS. CLARKE: Paragraph 31. That's section 5. Page 17?

A. Paragraph 31 generally requested bid files, documents relating to bids submitted by Birtcherd Dairy and the documents that were used in preparing the bids submitted by Birtcherd Dairy to the United States military installations, to various schools and other customers whose business was bid for.

BY MS. CLARKE:

Q. You would explain to the jury how the bid files from the dairy company would be used by a federal grand jury investigating antitrust violations?

A. The bid files themselves are one of the primary tools that the grand jury uses in conducting an antitrust investigation. Particulary when the allegations of the investigation is focused on bid rigging, those files, if there is a violation, would be evidence of the crime itself. The files, the actual bids would be the evidence. The files themselves also may contain a great deal of evidence relating to the crime.

They often, if there was a crime, they often contain notations by the person who prepared the bid. Possibly records of discussions with other people either

* * * *

military as a result of the Department of Defense request. However, from the get go, from the initial subpoenas that were issued by the grand jury school bids were included and were a focus based on some historical information that we knew as a staff and kind of the collective memory of the Antitrust Division schools are a focus in a bid rigging investigation of this nature.

Q. When the investigation was closed in 1988 it was still primarily an investigation concerning the bid rigging of military contracts, wasn't it?

A. I believe that the title of the investigation was, within the Antitrust Department or division was military procurement investigation of milk. Something along those lines.

MR. LAWRENCE: Defendant's 103. Just mark it.

You don't have that. Your Honor. That was first. If I may give you an extra one. This is among the documents that I got from the Government this morning.

THE COURT: All right.

Is this the one that you are going to put in evidence?

MR. LAWRENCE: No. I have another copy for him.

THE COURT: Okay. The original one, mark that one, because this has some highlights in it.

MR. LAWRENCE: Yes, sir.

* * * *

Supreme Court, U.S.
FILED
FEB 17 1993
OFFICE OF THE CLERK

No. 92-1085

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MARYLAND AND VIRGINIA MILK PRODUCERS COOPERATIVE ASSOCIATION, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE NATIONAL COUNCIL OF FARMER COOPERATIVES IN SUPPORT OF PETITION

JAMES S. KRZYMINSKI
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BRIEF OF AMICUS CURIAE NATIONAL COUNCIL OF FARMER COOPERATIVES IN SUPPORT OF PETITION

INTEREST OF AMICUS CURIAE NATIONAL COUNCIL OF FARMER COOPERATIVES.

The National Council of Farmer Cooperatives (hereinafter referred to as the "National Council") is a nationwide association of cooperative businesses owned and controlled by farmers. Its membership includes nearly 100 major marketing and farm supply cooperatives, the banks of the Farm Credit System, and 31 State councils of farmer cooperatives. The National Council's members handle practically every type of agricultural commodity produced in the United States. They market these commodities domestically and around the world, and they furnish supplies and credit to their farmer members and patrons.

The National Council represents about 90% of the nearly 4,700 local farmer cooperatives throughout the nation, and those cooperatives have a combined membership of nearly 2,000,000 farmers.

The interest of the National Council in this vicarious liability criminal antitrust case against a farmer cooperative is to urge the Court to review the Fourth Circuit's decision on constitutional grounds of major importance to farmer cooperatives generally. The National Council respectfully submits the lower courts should have followed controlling decisions of this Court and dismissed the indictment under the Due Process Clause of the Fifth Amendment because of the government's extraordinarily lengthy,exceedingly prejudicial and wholly unjustified preindictment delay. In addition, both the district court and the court of appeals erred when they failed to follow other controlling decisions of this Court and allowed the

federal prosecutors unconstitutionally to suppress critically important impeachment and credibility evidence which, if produced in this vicarious liability case, could have dramatically changed the jury's verdict at the end of the trial. The National Council will demonstrate that, in imputed liability criminal cases of this nature, constitutional violations of that magnitude not only deprive a farmer cooperative of the ability fairly to defend itself against an indictment in the ordinary sense, but they also effectively strip the cooperative of exemptions from the antitrust laws enacted by Congress and the States specifically to protect farmer cooperatives against such liability.

The National Council's interest also extends to the Fourth Circuit's failure to recognize that the fine and related penalties imposed on the farmer cooperative in this vicarious liability case were likewise unconstitutional, grossly unfair, excessive and contrary to the "factors relating to imposition of fines" specified by Congress in the Criminal Fines Enforcement Act, 18 U.S.C. 3622. The district court fined the cooperative and its farmer members $1,100,000, notwithstanding they were clearly personally innocent of the unauthorized, relatively minor violation of the Sherman Act allegedly committed several years ago by an employee the cooperative discharged in 1986. As a result of its conviction in this case, the cooperative was also automatically suspended as a government contractor, and thus the cooperative lost another $10,000,000 in federal military sales. The cooperative and its members were thereupon subjected to a civil antitrust action filed by the Attorney General of Virginia in which the State of Virginia claimed an additional sum in excess of $20,000,000. The National Council respectfully submits that, at the very least, this travesty of justice should be remanded to the district court for resentencing.

SUMMARY OF ARGUMENT

1. *Unconstitutional Preindictment Delay*—This case is a classic example of unconstitutional preindictment delay. The indictment was actually barred by the applicable five-year statute of limitations. Thus, the Fourth Circuit erred by failing to dismiss the indictment for both unconstitutional preindictment delay and limitations. *United States v. Marion*, 404 U.S. 307 (1971). In the alternative, the indictment is still barred by unconstitutional preindictment delay because the delay of more than seven years was exceedingly prejudicial; it was *not* 'investigative delay'; and it was totally unjustified by the government. *Dickey v. Florida*, 398 U.S. 30 (1970); *United States v. Lovasco*, 431 U.S. 783 (1977).

2. *Unconstitutional Suppression Of Evidence By The Prosecutors*—Having subjected petitioner cooperative to unconstitutional delay, it was imperative for the prosecutors to disclose any *impeachment* or *credibility* evidence they possessed regarding their star witness, the cooperative's former employee for whose alleged crime the cooperative was vicariously indicted. They wilfully failed to do so and grossly misled the cooperative about the nature of his testimony. This suppression of critical evidence violated the cooperative's rights under the Fifth and Sixth Amendments. *Brady v. United States*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Bagley*, 473 U.S. 667, 675 (1985).

3. *Unconstitutional Sentencing Procedure and Fine*—The $1,100,000 fine imposed on the first offender cooperative, which must be paid by its individual farmer members, violates the Fifth and Eighth Amendments and the Criminal Fines Enforcement Act, 18 U.S.C. 3622. *Gardner v. Florida*, 430 U.S. 349, 358 (1977); *United States v. Harvey*, 885 F.2d 181 (4th Cir. 1989).

ARGUMENT

I

THIS VICARIOUS LIABILITY CRIMINAL CASE SHOULD BE REVIEWED, REVERSED AND DISMISSED FOR UNCONSTITUTIONAL PREINDICTMENT DELAY

As the petition for a writ of certiorari demonstrates, no rule of criminal antitrust law is more Draconian or oppressive than the "vicarious liability rule". That rule imposes criminal liability on a corporate employer for a lower level employee's violation of the Sherman Act, even in cases where the employee acted entirely without the corporation's knowledge, authorization or approval, and contrary to the employer's antitrust policies and instructions. *United States v. Basic Construction Co.*, 711 F.2d 570 (4th Cir. 1983), *cert. denied*, 464 U.S. 956 (1983); *United States v. Hilton Hotels Corporation*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied* 409 U.S. 1125 (1973). Consequently, it is exceedingly difficult for any corporation successfully to defend itself in any vicarious liability case—even when the employee, who allegedly violated the Sherman Act, is still employed and available for pretrial preparation and as a witness for the corporation at trial.

In the case at bar, however, the incorporated farmer cooperative's predicament was practically impossible. The lower level employee, who allegedly violated the Sherman Act in 1984, was discharged for other reasons in 1986. The cooperative was not indicted for the employee's alleged crime until 1991, i.e. more than seven years after the alleged Sherman Act violation took place. Because of his dismissal from employment, the employee was disgruntled and hostile to the cooperative. In fact, a Department of Justice memorandum, not unearthed until after the trial in this case, establishes that the employee was determined to get even with the cooperative for the discharge, and that accordingly he worked closely with federal prosecutors to obtain the cooperative's indictment and

conviction (Pet.App. 63a-65a). Moreover, when the employee was dismissed in 1986, he took all his personal work papers with him. As a result, the cooperative was essentially defenseless when it was indicted in 1991 for his alleged Sherman Act bid-rigging violation. Both the employee who committed the crime vicariously charged against the cooperative was gone and working with the prosecutors, and all of the employee's work papers, bid documents, bid computations, memoranda and correspondence were likewise missing. Obviously, the employee's critically important personal bid records and computations could not be obtained or duplicated from any other source, as suggested by the Fourth Circuit.

As further demonstrated in the petition for certiorari, the government thereupon proceeded to make matters even more impossible for the cooperative in 1991. After waiting more than seven years to indict the cooperative, it successfully opposed or precluded each and every pretrial effort the cooperative made to obtain information or discovery from its former employee regarding his alleged Sherman Act violation.

The National Council thus respectfully submits that this case is a classic example of *unconstitutional preindictment delay*. The delay involved is extraordinary. The indictment was filed more than seven years after the alleged Sherman Act offense took place in 1984, and more than five years after the cooperative removed the disgruntled employee from his position. See *Dickey v. Florida*, 398 U.S. 30 (1970). "Stale claims have never been favored by the law, and far less in criminal cases". *Dickey, supra*, at p. 37.

In fact, as the petition for certiorari argues, the indictment was actually barred by the applicable five-year statute of limitations, 18 U.S.C. 3282. See *United States v. Marion*, 404 U.S. 307, 322-23 (1971). This Court, of course, has repeatedly emphasized that "criminal statutes of limitation are to be *liberally interpreted* in favor of

repose." *United States v. Marion, supra,* at p. 323, n.14; *United States v. Scharton,* 285 U.S. 518 (1932); and that the applicable period of limitations (five years) specified "a limit beyond which there is *an irrebuttable presumption* that a defendant's right to a fair trial would be prejudiced." See *Marion,* at pp. 322-23. In this regard, three justices of this Court wrote in their concurring opinion in *Marion,* at p. 331:

> "The impairment of the ability to defend oneself may become acute because of delays in the pre-indictment stage. Those delays may result in the loss of alibi witnesses, the destruction of material evidence, and the blurring of memories. At least when a person has been accused of a specific crime, he can devote his powers of recall to the events surrounding the alleged occurrences. When there is no formal accusation, however, the State may proceed methodically to build its case while the prospective defendant proceeds to lose his."

Basically, therefore, the National Council urges this Court to hold that the Fourth Circuit erred by failing to dismiss the indictment for *both unconstitutional preindictment delay and under the five-year statute of limitations.* As petitioner herein has established, the government failed to prove that the indictment was not barred by limitations, and the district court did not instruct the jury in this regard. See *Grunewald v. United States,* 353 U.S. 391, 396-97, 413-15 (1957).

Assuming *arguendo* that, contrary to *Marion, supra,* this Court opts to construe the five-year statute of limitations "restrictively" (as did the Fourth Circuit) instead of *"liberally. . .in favor of repose"*, the National Council nevertheless still believes the indictment must be dismissed for unconstitutional preindictment delay. In *United States v. Lovasco,* 431 U.S. 783, 790 (1977), this Court ruled that, in cases *where the period of preindictment delay is shorter*

than the applicable statute of limitations period, "The due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." In this case, actual "*prejudice to the accused*" was established beyond a shadow of a doubt, but the prosecutors offered *no* alleged "*reasons for the delay*" until they filed their brief in the Fourth Circuit. Those alleged "reasons" were totally disingenuous. In other words, the prosecutors followed the same procedure here as the prosecutors followed in *Lovasco*, where Mr. Justice Marshall complained for this Court: "[T]here is, unfortunately, no evidence concerning the reasons for the delay in the record. . ."(See 431 U.S. 796). Mr. Justice Stevens thereupon stated in his dissenting opinion, at 431 U.S. 799:

> "This finding of a continuing investigation, which forms the foundation of the majority opinion, comes from statements of counsel made during the appellate process. As we have said of other unsworn statements which were not part of the record and therefore could not have been considered by the trial court: "Manifestly, [such statements] cannot be properly considered by us in the disposition of [a] case. . . ."[1]

The National Council respectfully submits that, under these circumstances, the indictment in this case should also be dismissed because of the government's failure to present evidence in the record to justify its years of preindictment delay. See *Adickes v. S.H. Kress & Company*, 398 U.S. 144, 157-58, n.16. At the very least, this case should be remanded to the district court with a direction that a hearing be held to determine why the government failed to file the indictment for so many years. This relief

---

[1] In *Lovasco*, the indictment was dismissed by the district court after a hearing, for 18 months of unexplained, unjustified preindictment delay. The Court of Appeals affirmed because it agreed the delay was "unjustified, unnecessary and unreasonable." (see 431 U.S. 785-87).

is plainly mandated by the magnitude of "*actual prejudice*" suffered by the farmer cooperative as a result of the government's unjustified, unnecessary, unreasonable delay. That prejudice, supported by evidence in the record, is as follows:

1. In a vicarious liability case of this nature, wherein the farmer cooperative was indicted in 1991 for an unauthorized violation of the Sherman Act allegedly committed by a former employee in 1984 prior to his discharge in 1986, the cooperative's ability to defend itself depended almost exclusively on that employee's availability to assist in preparation for trial and to testify as a witness for the cooperative at trial. After all, the cooperative was indicted for a crime allegedly committed by that employee on his own motion, without the knowledge or authorization of the cooperative. But the cooperative's ability to defend itself in 1991 was fatally prejudiced during the lengthy period of preindictment delay when he thereupon became exceedingly disgruntled and hostile to the cooperative. He unfairly and surreptitiously joined forces with the prosecutors, obtained personal immunity from prosecution, and became the key witness for the government in its belated attempt to indict and convict the cooperative for that employee's alleged bid-rigging offense.

In *Dickey v. Florida, supra*, this Court ruled that a defendant was unconstitutionally prejudiced by an 8-year indictment delay because "In the interval two witnesses died and another potential witness is alleged to have become unavailable" (398 U.S. 36). Here, the cooperative's indispensable witness became irrevocably hostile and totally unavailable to the cooperative in its defense against the indictment. He actually became the government's "secret weapon" against the cooperative in this criminal case. His surprise appearance at the trial as the star witness for the government clearly did not aid the cooperative's

defense, as the Fourth Circuit suggested. On the contrary, it assured the cooperative's unconstitutional conviction.[2]

2. The severe prejudice inflicted by the government's preindictment delay on the cooperative's ability to defend itself was exacerbated by other actions the government took to deny the cooperative access to the hostile employee and to his testimony regarding the alleged Sherman Act violation. The prosecutors prevented the employee from testifying before the grand jury. They quashed the cooperative's motion to take his deposition. They intentionally misled the cooperative by disclosing that, in 1987, the employee denied any and all knowledge of school bid-rigging, and thus they represented he probably would not be called as a witness for the government at trial.

3. In addition, the cooperative was further prejudiced when, during the years of preindictment delay, the hostile employee departed with all his personal bid papers, as well as correspondence and memoranda regarding his activities. Without him and without his records, the cooperative had no means of defense against an indictment based on that employee's alleged unauthorized violation of the Sherman Act. In *Dickey v. Florida, supra*, "records of possible relevance" were likewise lost (398 U.S. 36). In *United States v. Richburg*, 478 F.Supp. 535, 539-546 (M.D. Tenn. 1979), records and notes which could have assisted the defendants in cross-examination of government witnesses were lost during 32 months of preindictment delay. Thus, the indictment was dismissed as to those defendants. See also: *United States v. Sample*, 565 F.Supp. 1166 (E.D. Va. 1983).

4. Finally, the cooperative in this case was even more severely prejudiced by preindictment delay when it was

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[2] See also *Howell v. Barker*, 904 F.2d 889, 891 (4th Cir. 1990), *cert. denied* 111 S.Ct. 590 (1990) where 27 months of preindictment delay was ruled unconstitutional because, during the period of delay, defendant's alibi witness became unavailable.

unable to interview or depose the discharged, hostile employee to determine whether his alleged violation of the Sherman Act, now charged against the cooperative, was in any respect exempt from the antitrust laws under several statutes enacted by Congress and the States to shield farmer cooperatives from antitrust liability. See the Capper-Volstead Act, 7 U.S.C. 291; the Clayton Act, § 6, 15 U.S.C. 17; the Cooperative Marketing Act, 7 U.S.C. 455; the Agricultural Fair Practices Act, 7 U.S.C. 2301 *et seq.*; and Code of Virginia, §§ 59.1-9.4(2); 3.1-461.

Under the Capper-Volstead Act and the Clayton Act, *supra*, two or more farmer cooperatives may lawfully enter into non-predatory marketing agreements and combinations, and those agreements are immune from prosecution under the Sherman Act. See *Fairdale Farms v. Yankee Milk, Inc.*, 635 F.2d 1037 (2d Cir. 1980), *cert. denied* 454 U.S. 818 (1981); *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative*, 413 F.Supp. 984 (N.D.Cal. 1976), affd. 580 F.2d 369 (9th Cir. 1978), *cert. denied* 439 U.S. 1090 (1979); *United States v. Maryland Cooperative Milk Producers, Inc.*, 145 F.Supp. 151 (D.C. D.C. 1956).

Virginia, in turn, enacted the Virginia Milk Commission law which pervasively regulates milk marketing and pricing in southeastern Virginia. Code of Virginia,§ 3.1-425. That statute provides, at Code of Virginia, § 3.1-461:

> "Marketing Agreements Not Deemed Monopolistic Or In Restraint Of Trade
>
> "The making of marketing agreements between producers' cooperative marketing associations [the cooperative in this case] and distributors [Pet in this case]. . .shall not be deemed a combination in restraint of trade or an illegal monopoly, or an attempt to lessen competition or fix prices. . ., nor shall the marketing contract or agreements between the association [the cooperative] and the

> distributors [Pet]. . .be considered illegal or in restraint of trade."

In *Parker v. Brown*, 317 U.S. 341 (1943), this Court ruled that marketing agreements and marketing combinations made in accordance with a raisin marketing program established by California under the California Agricultural Prorate Act are immune from scrutiny under the Sherman Act because Congress did not intend that actions taken under or authorized by state statutes be prosecuted as violations of the antitrust laws. Chief Justice Stone, writing for this Court, stated at 317 U.S. 350, 51:

> "We find nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain. . .activities directed by [a State] legislature."[3]

In this case, however, the cooperative was unfairly precluded by the discharged employee's complete inaccessibility from even determining whether it had a viable "*state action*" defense based on the Virginia statute. Consequently, when the cooperative moved to dismiss the Sherman Act charge under the "state action" doctrine of *Parker v. Brown*, *supra*, the district judge refused even to consider the motion, stating: "That's a red herring" (JA 671). The Fourth Circuit, in turn, rejected the argument in a mere footnote to its decision (Pet. App. 29a (n.11)).

Furthermore, as stated above, there is not a scintilla of evidence in the record to support the government's belated claim that its preindictment delay of more than seven years was "*investigative delay*". See *Lovasco, supra.* Here, the delay was "*inexplicable delay.*"

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[3] See also: *Flav-O-Rich, Inc. v. North Carolina Milk Commission*, 593 F.Supp. 13 (E.D. N.C. 1983); *Wainwright v. National Dairy Products Corp.*, 304 F.Supp. 567 (N.D. Ga. 1969).

Based on the foregoing, the National Council urges this Court to review this case and dismiss the indictment for plain unconstitutional preindictment delay.

II

THIS VICARIOUS LIABILITY CRIMINAL CASE SHOULD ALSO BE REVIEWED AND REVERSED BECAUSE THE PROSECUTORS WILFULLY SUPPRESSED CRITICALLY IMPORTANT IMPEACHMENT AND CREDIBILITY EVIDENCE.

As stated above, in a vicarious liability criminal case of this nature, the cooperative's ability effectively to defend itself depends almost entirely on the availability of the employee who allegedly committed the unauthorized crime, during both the cooperative's preparation for trial and as a witness for the cooperative at trial. Here, that availability was foreclosed by unconstitutional preindictment delay, and the cooperative was unable to obtain any information from the employee prior to trial due to the prosecutors' opposition.

Under these circumstances, it was obviously imperative for the prosecutors to disclose to the cooperative any *impeachment* or *credibility* evidence they possessed regarding the former employee for whose alleged crime the cooperative was indicted. They failed to do so. Instead, they wilfully misled the cooperative by releasing only a tiny piece of information which depicted the former employee swearing to the prosecutors (and numerous federal investigators) in 1987 that he had no knowledge of any kind regarding school milk contract bid-rigging (Pet.App. 66a). Thus, *throughout the trial*, the prosecutors wilfully suppressed the following vitally important *impeachment* and *credibility* evidence in violation of the cooperative's right to due process and a fair trial under the Fifth and Sixth Amendments:

1. Evidence that the former employee had an important stake in the outcome of this litigation. The former employee had a burning desire to get even with the cooperative (as well as the employee who replaced him in 1986) by seeking their indictment and conviction for one or more alleged crimes he sought to create (Pet.App.63-65a).

2. Evidence that shortly after his discharge, the former employee voluntarily came to the prosecutors and proffered a series of criminal charges against the cooperative, all of which were investigated by the prosecutors before a grand jury and found to be wholly unsupportable and unsustainable (Pet.App. 63-65a).

3. Evidence to establish what caused the former employee diametrically to change his 1987 testimony when he testified for the government in 1991. In 1987, the former employee testified he had no knowledge of any school contract bid-rigging. However, at trial in 1991 he testified he personally engaged in school contract bid-rigging in 1984, and thus he harnessed the cooperative with vicarious liability for his own alleged offense.[4]

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), this Court held that "suppression by the prosecution of evidence favorable to the accused upon request. . .violates due process,. . .irrespective of the good faith or bad faith of the prosecution." In *Giglio v. United States*, 405 U.S. 150 (1972), this Court ruled that in criminal prosecutions where the government's case depends heavily on the testimony of a particular witness, that witness' credibility or reliability are vitally important. Thus, this Court held that, in such cases, it is incumbent on prosecutors to disclose any material *impeachment* or *credibility* evidence in their pos-

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[4] According to the petition for certiorari, this evidence resides in the prosecutors' notes covering their 90 hours of interrogation of the employee on 13 different occasions in 1991. During that period, the employee received numerous grants of personal immunity from prosecution.

session. In sum and substance, the prosecutors must disclose all evidence in their possession which, if withheld, would deprive the accused of a fair trial. *United States v. Bagley*, 473 U.S. 667, 675 (1985). Indeed, the prosecutors have a "duty to produce" all evidence which might be supportive of the accused's claim of innocence. *United States v. Agurs*, 427 U.S. 97, 107 (1976).

The National Council submits that the Fourth Circuit erred by holding, contrary to the Department of Justice's internal memorandum released after the cooperative's conviction, that "this is [*not*] a case in which the key government witness had a personal stake in the outcome of the litigation" (Pet.App. 18a). Here, the government's star witness had an overwhelming interest in the outcome. He was determined to get even with the cooperative for his 1986 discharge by obtaining the cooperative's vicarious conviction in this case for a crime he (the employee) allegedly committed. See *Giglio*, *supra*, at 405 U.S. 154-55. When the prosecutors withheld all the other impeachment and credibility evidence described above, they deprived the cooperative of evidence "so clearly supportive of a claim of innocence" that the prosecutors had a plain "*duty*" to produce it. *United States v. Agurs*, *supra*, at 427 U.S. 107.

On this ground, too, the National Council urges this Court to review this case and reverse the Fourth Circuit's erroneous decision which clearly conflicts with several important decisions of this Court.

III

THIS VICARIOUS LIABILITY CASE SHOULD LIKEWISE BE REVIEWED TO DETERMINE WHETHER THE SENTENCING AND FINE WERE UNCONSTITUTIONAL AND UNLAWFUL.

The sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). Defendants clearly

have a legitimate interest in the character of the procedure which leads to the imposition of sentence. *Witherspoon v. Illinois*, 391 U.S. 510, 521-23 (1968). Due process is flexible, and thus it calls for such procedural protections as the particular situation demands. *Gardner*, *supra*, at 430 U.S. 358, n.9. In addition, of course, excessive fines are prohibited by the Eighth Amendment.

Moreover, sentencing in this case was governed by the Criminal Fines Enforcement Act, 18 U.S.C. § 3622 entitled "Factors Relating To Imposition of Fines". That statute enumerates several factors district courts must consider when imposing sentences. An excessive fine can be reversed under the abuse of discretion standard. See *United States v. Harvey*, 885 F.2d 181 (4th Cir. 1989).

Applying these principles to the case at bar, the National Council submits that, for the following reasons, the $1,100,000 fine imposed on the cooperative is grossly excessive, constitutionally objectionable and violative of the letter and spirit of the statutory "*fine factors*" specified in 18 U.S.C. 3622:

1. The $1,000,000 portion of the fine imposed on the cooperative for the Sherman Act violation was the *maximum* fine then imposable on *any* "*corporation*" under that statute (15 U.S.C. 1). But, the court failed to recognize that, while legally the cooperative is a "corporation", under cooperative fiscal and funding procedures, the fine is ultimately assessed against and paid by the *individual farmer members* of the cooperative. The maximum fine then imposable on *individuals* under the Sherman Act was $100,000.

2. The additional $100,000 fine levied by the court under the two extremely technical mail fraud counts of the indictment—$50,000 on each count—was likewise grossly excessive. Under the Mail Fraud Statute, 18 U.S.C. 1341, the maximum fine specified was "not more than $1,000." Having already imposed the *maximum* $1,000,000 fine on

the cooperative under the Sherman Act, the court nevertheless abused its discretion by ignoring the maximum statutory fine. Instead it utilized the discretionary "Alternative Fine" provisions of 18 U.S.C. 3623 to saddle the farmer members of defendant cooperative with a staggering fine *50 times greater than the maximum fine specified in the Mail Fraud statute itself.*

3. The *"Factors Relating To Imposition Of Fines"* prescribed by Congress in 18 U.S.C. 3622 plainly do *not* support or justify the court's excessive, abusive actions in this case. *First*, the offense charged against the cooperative is *"vicarious"* only—the cooperative was convicted of crimes allegedly committed by a former employee without the cooperative's knowledge, authorization or direction. *Second*, the cooperative is a farmers' organization *which has never been convicted of any other criminal offense.* In other words, this is its *first* offense. *Third*, any fine in this case will ultimately be charged against and paid by the cooperative's individual farmer members. *Fourth*, the excessive, bloated fines imposed by the court will thus place a heavy burden on each of the cooperative's individual members. Those members are *totally innocent* of the crimes allegedly committed by the former employee, and *many of them were not even members of the cooperative when the crimes were allegedly committed.*

Fifth, the government offered no evidence at the trial to support a contention that any Virginia school or any Virginia school children or their parents suffered any pecuniary loss as a result of the alleged offense. Indeed, the government's own witnesses insisted the alleged Sherman Act violation did not result in any *price increases* or *increased profits.* In fact, the evidence established that, throughout the indictment period, the Virginia schools resold the cooperative's milk with an approximately 100% mark-up. *Sixth*, nevertheless the cooperative's farmer members were compelled (through the aforesaid treble damage antitrust action brought by the State of Virginia)

to pay $1,050,000 in "restitution" to Virginia schools, *in addition* to the $1,100,000 fine imposed on the cooperative by the court in this criminal case.

Seventh, the government failed to prove there are any "illegally obtained gains" to be recovered from the cooperative or its members in this case. *Eighth*, the expense of the fine cannot be passed on to customers. Rather, as stated above, it must be paid by the individual farmer members of the cooperative. And, *ninth*, in response to 18 U.S.C. 3622's last "fine factor", the cooperative discharged the employee who allegedly committed the Sherman Act violation in this case more than five years before it was indicted by the government.

Based on this record, the National Council respectfully submits that the $1,100,000 fine imposed on the farmer cooperative in this case was excessive, unfairly abusive and unconstitutional under the Fifth and Eighth Amendments.

* * *

Any doubt about the wholly unjust, unconstitutional nature of the truly excessive fine imposed on the cooperative in this case vanishes when two additional factors are brought to light. First, as a result of the conviction in this case, the cooperative was automatically suspended as a government contractor by the Defense Logistics Agency, and it was thus forced to lose $10,000,000 in federal military installation sales before it was recently reinstated.

Finally, when the cooperative appeared before the district court for sentencing, the court insisted on fining the cooperative for damages allegedly sustained by the City of Norfolk schools. However, bids and sales to Norfolk were not covered by either the indictment or the government's proof at trial. The Fourth Circuit erroneously sustained this punitive procedure, which clearly violates the Due Process Clause of the Fifth Amendment, stating (Pet.App. 36a):

> ". . .[W]hether or not such evidence was admitted at trial, a court can and should consider the total amount of pecuniary loss to victims of a crime when determining an appropriate sentence. . . ."

But there is absolutely nothing in the indictment or the record in this case to suggest that Norfolk or its schools were, in any respect, victimized by the cooperative. And, as the largest city in southeastern Virginia, Norfolk's improper involvement in the sentencing procedure contributed disproportionately to the excessive fines imposed by the court.

CONCLUSION

The petition for a writ of certiorari should be granted. This case should be reviewed on constitutional grounds. The decision of the Fourth Circuit should be reversed, and the indictment dismissed or a new trial granted. At the very least, the case should be remanded for resentencing.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1992

MARYLAND AND VIRGINIA MILK PRODUCERS COOPERATIVE ASSOCIATION, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly rejected allegations of preindictment delay where the court found that the government had diligently investigated and prosecuted the case and had not sought any tactical advantage from the delay.

2. Whether the government was required to turn over to petitioner the interview notes of a government witness where both courts below, after *in camera* inspections, concluded that the notes contained neither Jencks Act statements nor undisclosed *Brady* material.

3. Whether the court of appeals correctly concluded that the Sherman Act conspiracy continued until the summer of 1987 and that its prosecution thus was not barred by the statute of limitations.

4. Whether the court of appeals' conclusion that petitioner had "devised a scheme to defraud the City of Newport News of money or property and used the mails to further the scheme" conflicts with this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is unpublished, but the judgment is noted at 974 F.2d 1333 (Table).

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1992. A petition for rehearing was denied on October 6, 1992. Pet. App. 37a. The petition for a writ of certiorari was filed on December 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiring to rig bids for the supply of milk and other dairy products to Virginia public schools between 1984 and 1987, in violation of the Sherman Act, 15 U.S.C. 1, and two counts of mail fraud, in violation of 18 U.S.C. 1341. Pet. App. 2a. Petitioner was sentenced to pay a fine of $1,000,000 on the Sherman Act count and $50,000 on each of the mail fraud counts.

1. Petitioner is an agricultural corporation owned and operated by approximately 1,400 dairy farmers who produce milk in Delaware, Maryland, Pennsylvania, Virginia, and West Virginia. One of petitioner's divisions, the Marva Maid Dairy, converts raw milk into processed milk, butter, cream, and similar products for sale to commercial, military, and school customers in the Tidewater and Colonial Heights-Petersburg markets of Virginia. Pet. App. 3a.

Public schools in the Commonwealth of Virginia purchase half-pint cartons of milk for school lunches on the basis of competitive bids. Bids must be submitted in sealed envelopes, and most school districts in Virginia require each signed bid to include an affirmation that the bid is not the result of collusion or agreement with any other bidder. Contracts are awarded to the lowest bidder in the spring or summer of each year. Each contract usually runs for a period of 12 months beginning in late summer. Pet. App. 4a.

The evidence at trial showed that petitioner agreed with a competitor, Pet Dairy, Inc., to rig the bids for

school milk contracts for the school years 1984-1985, 1985-1986, and 1986-1987. Charles Elliott, the manager of petitioner's Marva Maid division from September 1983 to December 1986, testified that he met with Douglas Stamper and Lawrence Altaffer of Pet Dairy to rig the contracts, and that he did so with the approval of at least one other of petitioner's managers. Stamper and Altaffer also testified at trial, and they corroborated Elliott's account. Pet. App. 4a-7a & n.6, 26a.

Elliott first met with representatives of Pet in the spring of 1984. At that meeting, Elliott and Pet's representatives reviewed the school contracts that petitioner and Pet then held, and they agreed that each company would keep its current contracts for the following year, except that petitioner's Marva Maid division would be the low bidder for the Williamsburg contract, a contract then held by Pet. Pet agreed to submit high bids on the contracts allocated to petitioner's Marva Maid division, and petitioner agreed to bid high on the contracts allocated to Pet. Pet. App. 6a. It was understood that the agreement would continue beyond the 1984-1985 school year, subject to confirmation each year. *Ibid.* Following that 1984 meeting, petitioner's Marva Maid division was awarded the Williamsburg contract, and Pet and petitioner's Marva Maid division otherwise retained the contracts they had previously held. *Ibid.*

Elliott and Stamper later twice confirmed their bid-rigging agreement for each of the 1985-1986 and 1986-1987 school years. Pet. App. 6a-7a. Petitioner and Pet submitted bids in accordance with the secret

agreements for each of those years, and each won its assigned contracts. The payments obtained by petitioner as a result of the bid-rigging scheme included two checks that were mailed by the City of Newport News, Virginia, for the performance of the 1985-1986 and 1986-1987 school lunch contracts. The checks were mailed in September 1986 and March 1987, respectively. *Id.* at 7a.

2. Prior to trial, petitioner moved for the production of exculpatory materials in the government's possession pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963). The government responded by informing petitioner that, during an interview conducted by prosecutors on April 2, 1987, Elliott had stated that "he had no basis to believe [that] there had been collusion on school bids." Pet. App. 10a. Petitioner also moved before trial for the production of any notes taken by prosecutors during their investigative interviews of Elliott. The government opposed that motion because the interview notes did not reflect verbatim statements by Elliott, but merely the prosecutors' impressions, and because the government had not yet determined whether to call Elliott as a witness. The court denied petitioner's motion. When Elliott was called by the government at trial, petitioner again sought disclosure of the notes. The government argued that it had made all the disclosures that were required by *Brady* and the Jencks Act, 18 U.S.C. 3500. The court again denied petitioner's motion. After the jury returned a guilty verdict, the district court examined the notes *in camera* and ruled that there was "no basis in law or fact" for ordering their production. Pet. App. 10a-11a.

3. The court of appeals affirmed. The court of appeals first rejected petitioner's claim that its due process rights were violated by the government's delay in seeking and obtaining an indictment. Pet. App. 11a-14a. The court noted that in order to succeed on its due process claim, petitioner bore the burden of showing both "actual prejudice" from the delay and "that the delay, balanced against the reasons for the delay proffered by the government, offends 'fundamental conceptions of justice' or 'the community's sense of fair play and decency.' " *Id.* at 11a.

The court concluded that petitioner had established neither element. As to the first, the court rejected petitioner's contention that it had been prejudiced by its inability to interview Elliott after petitioner fired him in 1986, and by its own innocent destruction of certain bid documents. The court noted that petitioner had "every opportunity to question Elliott at length at trial." Pet. App. 12a. In addition, the court explained that "other than its bald assertion that it lost key and essential documents," petitioner had failed to identify "any *specific* documents that prejudiced its case or prevented it from piecing together the bid workups from the years at issue, or the years that preceded the conspiracy," especially since "the bid documents in question were available from school districts to which the bids were submitted." *Id.* at 12a-13a.

As to the second element, the court noted that antitrust conspiracy investigations are inherently lengthy, and that in this case the government had been especially hampered by the initial false denials of any bid-rigging on the part of Elliott and other dairy

officials. Pet. App. 13a. Because "Elliott's 180-degree turn provided the primary catalyst in the return of the later indictment" and because the government "diligently investigated and prosecuted the case thereafter," the court concluded that the government had not impermissibly delayed its prosecution in order "to gain a tactical advantage over the accused." *Id.* at 13a-14a.

The court of appeals next rejected petitioner's claim that the government should have disclosed to the defense the notes the prosecutors took during their investigatory interviews of Elliott. Like the district court, the court of appeals reviewed the notes *in camera* and concluded that "the government met its obligation under *Brady* by providing all of the exculpatory and impeachment evidence it possessed." Pet. App. 18a. The court also concluded that disclosure of the notes was not required by the Jencks Act, 18 U.S.C. 3500. The court noted that a prosecutor's "[i]nterview notes are not Jencks Act statements unless the witness signed or otherwise adopted or approved the notes," or unless they are a "substantially verbatim" rendition of the witness interview. Pet. App. 21a. Here, "[o]n cross-examination, the defense tried (but to no avail) to develop a theory that Elliott had adopted or approved the notes," but was unable to "create an adequate foundation that would necessitate further inquiry" or even "a scintilla of evidence demonstrating that Elliott even tacitly adopted or approved the notes." Pet. App. 21a, 23a.

Finally, the court of appeals rejected petitioner's arguments that the Sherman Act charge was barred

by the statute of limitations and that the mail fraud counts were invalid under this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987). With respect to the statute of limitations, the court found that the government had "presented evidence that the conspiracy had its origins early in 1984 and that Elliott and Stamper agreed in 1986 to continue the bid rigging agreement for the 1986-1987 school year," which brought the conspiracy well within the five-year limitations period applicable to that charge. Pet. App. 24a-25a. With respect to petitioner's *McNally* argument, the court noted that Elliott testified that "absent the agreement with Pet Dairy, the bids submitted to the school districts would have been lower," and thus there was "ample evidence that [petitioner] devised a scheme to defraud the City of Newport News of money or property and used the mails to further the scheme." Pet. App. 31a-32a.[1]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioner first renews its contention that its due process rights were violated because the government purportedly waited "more than seven years" after petitioner committed "the basic Sherman

[1] The court of appeals also rejected numerous other arguments made by petitioner, including challenges to the sufficiency of the evidence (Pet. App. 27a-28a), the adequacy of the jury charge (*id.* at 32a-34a), and the propriety of the sentence (*id.* at 34a-36a). Petitioner does not renew those arguments in this Court.

Act offense in the Spring of 1984" before obtaining an indictment. Pet. 13-17. That contention is both factually and legally flawed. First, petitioner significantly exaggerates the length of the relevant delay because, as the court of appeals found (Pet. App. 24a-25a), petitioner actively continued its participation in the bid-rigging conspiracy through the 1986-1987 school year. Second, the court of appeals correctly concluded that any delay in indicting petitioner was fully justified by the fact that petitioner's officers and their co-conspirators initially denied any knowledge of bid-rigging, which left the government with insufficient evidence to indict. Pet. App. 13a.

As this Court has recognized, a claim of pre-indictment delay must be rejected where the delay at issue was necessary for the government to determine that a prosecution was justified and to assemble sufficient evidence to prove guilt beyond a reasonable doubt. *United States* v. *Lovasco*, 431 U.S. 783, 795 (1977); see also *United States* v. *Gouveia*, 467 U.S. 180, 192 & n.7 (1984).[2] No different rule is appropriate in this case, especially in light of petitioner's failure

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[2] Petitioner contends (Pet. 17) that the decision below warrants review because, in conflict with another recent Fourth Circuit decision, the court held that due process is not violated unless the government intentionally delays an investigation to gain a tactical advantage. This Court, however, does not grant certiorari to review alleged conflicts between different panels of the same court of appeals. *Wisniewski* v. *United States*, 353 U.S. 901 (1957). In any event, the decision below is consistent with this Court's decision in *Gouveia* (467 U.S. at 192-193) and, as the court of appeals recognized, with the decisions of other circuits that have considered the issue. See Pet. App. 14a.

to carry its burden of demonstrating that it suffered specific prejudice as a result of the delay. While petitioner contests the correctness of that conclusion in this Court (see Pet. 15-17), that essentially factual determination by the court of appeals, see Pet. App. 12a, does not warrant further review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

2. Petitioner next contends that the government violated its *Brady* obligations and the Jencks Act, 18 U.S.C. 3500, by failing to produce the prosecutors' notes of their interviews of Elliott. Pet. 18-23. Petitioner's *Brady* claim fails because, as petitioner acknowledges (Pet. 5), the government disclosed to the defense the very fact that petitioner claims was essential to its defense—that Elliott initially claimed that no bid-rigging took place. See Pet. 21. While petitioner speculates that the notes may have contained additional impeachment information, that unadorned speculation casts no doubt on the court of appeals' conclusion, after reviewing the notes *in camera*, that "the government met its obligation[s] under *Brady* by providing all of the exculpatory and impeachment evidence it possessed." Pet. App. 18a.[3]

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[3] Petitioner also bases its *Brady* claim (Pet. 20) on a government memorandum (Pet. App. 63a-65a) that petitioner presented for the first time as an appendix to petitioner's rehearing petition in the court of appeals. That document explains that Elliott accused petitioner of other crimes, which the government ultimately chose not to prosecute because it was unable to obtain independent corroboration for those specific allegations. Contrary to petitioner's claim (Pet. 20), the memorandum does not suggest that prosecutors believed those other charges were "concocted" or "baseless." The memorandum merely reflects the government's practical

There is no greater force to petitioner's alternative argument that the notes should have been disclosed pursuant to the Jencks Act. Pet. 22-23. The Jencks Act provides that "[a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement * * * of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. 3500(b). The Act strictly limits what qualifies as a discoverable "statement." Other than the witness's grand jury testimony, it encompasses only "a written statement made by said witness and signed or otherwise adopted or approved by him" or a transcription of "a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement." 18 U.S.C. 3500(e); see also *Goldberg* v. *United States*, 425 U.S. 94, 105 (1976) ("writings must be produced only to the extent they are 'statements' as defined"); *Palermo* v. *United States*, 360 U.S. 343, 350 (1959) (policy of the Act is not to permit impeachment based on statements "which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations").

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reluctance to prosecute unless corroborating evidence could be found. Nor does the memorandum suggest that the government "hid" from petitioner the fact that "Elliott had been carrying a grudge." Pet. 20. Having fired Elliott, petitioner was well aware of that fact. In fact, petitioner questioned Elliott extensively about his alleged bias at trial. Tr. 440-443, 459-463, 485-495.

As the court of appeals concluded, petitioner failed to develop even "a scintilla of evidence demonstrating that" the notes qualified as Jencks Act "statements." Pet. App. 20a-23a. Thus, the threshold requirement for disclosure under the Jencks Act was absent. That fact distinguishes this case from *Goldberg* v. *United States*, *supra*, on which petitioner relies. In *Goldberg*, the government conceded that the prosecutors' notes fit within the Jencks Act definition of a "statement" because the witness had testified that he had reviewed and corrected them as they were being taken. 425 U.S. at 100-101. The issue in *Goldberg* was whether the government's claim of privilege could defeat the required disclosure of notes that otherwise fell within the reach of the Jencks Act. Because the notes in this case were not Jencks Act "statements," *Goldberg* does not help petitioner's cause.[4] In any event, as the court of appeals recognized after its own *in camera* review (Pet. App. 23a n.8), even if the Jencks Act required production of the notes, any error in failing to produce them was harmless because nothing in the notes would have aided the defense.

3. Petitioner next argues (1) that the court's jury instruction on the statute of limitations was

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[4] Petitioner contends that some of the Elliott interview notes were disclosed to the defendant in a related prosecution, *United States* v. *Hughes*, Cr. No. 92-25-N (E.D. Va. Apr. 23, 1992). Pet. 20. In that case, one of the government attorneys who took notes testified as a government witness. The government disclosed the notes taken by that attorney because the court held that the notes were Jencks Act statements *of that attorney*.

erroneous because it failed to place the burden of proof on this issue on the government and (2) that the government failed to prove that the conspiracy continued into the statutory period. Pet. 24-25. Petitioner did not raise a burden of proof objection to the statute of limitations instruction in the district court, however, and thus waived any objection to that instruction in the absence of plain error. There was no plain error in this case. In fact, the jury was instructed that "to find the defendant guilty of violating the Sherman Antitrust Act you must find beyond a reasonable doubt that it was a member of the conspiracy at some time after July 30, 1986." Tr. 1043. There is simply no basis in the record for petitioner's claim that the court charged the jury that the defendant had the burden of proof on this issue. Pet. 24.

Petitioner's claim that the evidence does not support the finding that the conspiracy continued past July 30, 1986, ignores the evidence that Elliott and Stamper confirmed their agreement for the 1986-1987 school year and that each delivery of milk and each payment received for that milk during that school year at the rigged price was an act in furtherance of the conspiracy. Pet. App. 25a. Moreover, while Elliott left petitioner's employ late in 1986 (*within* the statute of limitations period), the evidence showed that his successor, Thomas Neale, condoned the bid-rigging and knowingly continued petitioner's involvement in the conspiracy after Elliott's departure. Pet. App. 24a-26a. Petitioner's fact-bound disagreement with the conclusions of the district court and the court of appeals concerning the

sufficiency of the evidence on this issue does not warrant further review by this Court.

4. Finally, petitioner contends that its mail fraud convictions are inconsistent with *McNally* v. *United States*, 483 U.S. 350 (1987), which held that the mail fraud statute under which petitioner was convicted is limited to the protection of money or property rights. Petitioner's claim is based on an erroneous view of the indictment, evidence, and jury instructions. Consistent with this Court's decision in *McNally*, the indictment alleged that petitioner "devised and intended to devise a scheme and artifice to defraud the City of Newport News of money and property." Pet. App. 31a. The evidence amply established that allegation by showing that the bids received by the school districts would have been lower in the absence of petitioner's fraudulent bid-rigging scheme. *Ibid.* In addition, the jury was properly instructed that to convict on the mail fraud counts it had to find, *inter alia*, that petitioner "knowingly participated in a conspiracy to deprive the City of Newport News of money or property." *Ibid.* On this record, petitioner's *McNally* challenge lacks merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 92-1085

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MARYLAND AND VIRGINIA MILK PRODUCERS COOPERATIVE ASSOCIATION, INC.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF OF AMICUS CURIAE NATIONAL MILK PRODUCERS FEDERATION IN SUPPORT OF PETITION

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BRIEF OF AMICUS CURIAE NATIONAL MILK PRODUCERS FEDERATION IN SUPPORT OF PETITION

INTEREST OF NATIONAL MILK PRODUCERS FEDERATION.

The National Milk Producers Federation (the "Federation") is an association whose membership consists of nearly all the hundreds of milk marketing cooperatives which serve this nation's requirements for milk and dairy products. The Federation's members market a substantial portion of all milk produced in the United States. Thus, the Federation speaks authoritatively for dairy cooperatives and dairy farmers throughout the nation regarding legal and economic issues which affect the production and marketing of milk.

The Federation's basic mission is to protect, preserve and improve the economic well-being of dairy farmers, and thereby insure that the nation's consumers continuously enjoy an adequate supply of pure, wholesome milk. The Federation's members from across the country establish the Federation's policies and positions, so those policies and positions are truly those of American milk producers from every section of the United States. While the Federation and its members support government actions in the public interest, they vigorously oppose unconstitutional, unlawful or oppressive federal actions which place an unfair, unreasonable burden on individual milk producers or their cooperatives, or which operate unnecessarily and inordinately to increase the costs of production and marketing of milk.

The Federation's interest in this case is to implore this Court—on behalf of milk producers throughout

the United States—to review the Fourth Circuit's erroneous decision herein because it not only does violence to the constitutional rights and economic well-being of the dairy cooperative directly involved, it also threatens to do serious, irrevocable harm to the constitutional rights and economic well-being of dairy cooperatives and dairy farmers across the nation. Sadly, the unconstitutional prosecution tactics and procedures imposed on the dairy cooperative in this particular case are *not* unique. In line with the trend deplored by the Washington Post in its recent series of six articles entitled "The Appearance of Justice", they are rapidly becoming part and parcel of the Department of Justice's standard methodology in Sherman Act criminal antitrust prosecutions against dairy cooperatives and thousands of milk producers in this country.[1]

Indeed, as this case comes before this Court for consideration, the government is commencing a series of brand new milk industry criminal antitrust investigations before grand juries in the south, southwest and midwest which—if the Fourth Circuit's decision is allowed to stand without review—promise to inflict further devastating unconstitutional injury and crushing economic loss on dairy cooperatives and their individual farmer members.

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[1] The series of articles entitled "The Appearance of Justice" appeared in the Washington Post during the period from January 10 to January 15, 1993. Those articles question the constitutionality and fairness of aggressive prosecution tactics which regularly include the failure of prosecutors to disclose evidence in their possession that is essential to the defense of criminal charges, and the tendency of prosecutors to manipulate grand juries by failing to apprise them of evidence favorable to the accused.

Accordingly, the Federation prays the Court will grant certiorari in this case, and that upon review, it will revitalize the mandates of the Fifth, Sixth and Eighth Amendments in stale, antiquated vicarious liability criminal antitrust prosecutions under the Sherman Act against dairy cooperatives.

Petitioner and respondent have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Federation respectfully submits that the Fourth Circuit's decision is clearly erroneous and thus this Court should grant the petition for certiorari and, in the alternative, either (a) summarily reverse under Rule 16.1 of this Court's Rules, or (b) schedule the case for further briefing and argument.

1. *Statute of Limitations*—The government failed to prove beyond a reasonable doubt that the prosecution was *not* barred by the five-year statute of limitations, and the district court failed to charge the jury that the government had this burden of proof. Accordingly, the lower courts clearly erred by failing to dismiss the indictment, as a matter of law, under this Court's controlling decision in *Grunewald v. United States*, 353 U.S. 391, 396-97, 413-415 (1957). "Criminal statutes of limitation are to be liberally interpreted in favor of repose." *United States v. Marion*, 404 U.S. 307, 323 n.14 (1971). In this case, the Fourth Circuit *extended* the period of limitations on the basis of an asserted "*reasonable inference*" for which there is no foundation whatsoever in the record. (See Pet.App. 26a).

2. *Unconstitutional Preindictment Delay*—This case is a typical example of unconstitutional preindictment

delay. Petitioner cooperative proved that it was severely prejudiced by the government's extraordinarily lengthy delay of more than seven years. *Dickey v. Florida*, 398 U.S. 30 (1970); *Howell v. Barker*,904 F.2d 889 (4th Cir. 1990), *cert. denied* 111 S. Ct. 590 (1990). The government offered no evidence in the record to explain the extraordinary delay. At the appellate level, it attempted to argue that the delay was "investigative delay" but evidence in the record demonstrates the fallaciousness of that claim. In truth and in fact, the government did absolutely nothing to investigate the alleged Sherman Act violation from April 1984 to July 1986 and from January 1988 to 1991 when it finally indicted the cooperative. Under these circumstances, the indictment must be dismissed for unconstitutional preindictment delay. *United States v. Sample*, 565 F.Supp. 1166, 1183-84 (E.D. Va. 1983); *United States v. Richburg*, 478 F.Supp. 535, 539-46 (M.D. Tenn. 1979).

3. *Prosecutors' Suppression of Impeachment Evidence*—Having delayed the indictment for more than seven years in a vicarious liability criminal case, the prosecutors clearly had a "special duty" to disclose any impeachment or credibility evidence they had regarding their key witness (the disgruntled, hostile, former employee). *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Agurs*, 427 U.S. 97, 107 (1976); *United States v. Bagley*, 473 U.S. 667, 675 (1985). The prosecutors failed to do so. Thus, *throughout the trial*, they suppressed (1) evidence that the former employee had a personal stake in the outcome of the prosecution, and (2) statements the former employee made during 90 hours of intense interrogation in 1991 shortly before the stale indictment was filed

after so many years of delay (See Pet.App. 65a). Suppression of critical evidence, in violation of a defendant's constitutional rights, requires summary reversal. *United States v. Tincher*, 907 F.2d 600 (6th Cir. 1990); *United States v. Beasley*, 576 F.2d 626 (5th Cir. 1978), *cert. denied* 440 U.S. 947 (1978).

4. *The Hyper-Technical Mail Fraud Counts*—These two counts of the indictment should have been dismissed both on the merits and under this Court's controlling decision in *McNally v. United States*, 483 U.S. 350 (1987).

5. *The Excessive, Unconstitutional Fine*—Under the facts and circumstances of this case, the $1,100,000 fine imposed on the cooperative was patently excessive and violative of both the Eighth Amendment, and the factors specified by Congress in the Criminal Fines Enforcement Act, 18 U.S.C. § 3622. The sentencing procedure itself also violated the Fifth Amendment.

ARGUMENT

I

IN A VICARIOUS LIABILITY CRIMINAL CASE OF THIS NATURE AGAINST A DAIRY COOPERATIVE, THE INDICTMENT BASED ON AN ALLEGED STALE VIOLATION OF THE SHERMAN ACT BY AN INACCESSIBLE FORMER EMPLOYEE SHOULD BE DISMISSED BY FAIR APPLICATION OF EITHER THE STATUTE OF LIMITATIONS OR THE DOCTRINE OF UNCONSTITUTIONAL PREINDICTMENT DELAY.

A. THE STATUTE OF LIMITATIONS

In this case, the dairy cooperative was indicted on July 30, 1991 for an alleged violation of the Sherman

Act in the Spring of 1984 by a former employee the cooperative removed from his position in May, 1986 and discharged. The indictment was thus filed more than seven years after the alleged Sherman Act violation, and more than five years after the employee was separated from his position of employment by the cooperative and thus withdrew from the alleged Sherman Act violation.

This case is governed by the five-year statute of limitations prescribed by 18 U.S.C. § 3282, and the government failed to prove beyond a reasonable doubt that the prosecution was *not* barred by that period of limitations. The district court, in turn, failed to charge the jury that the government had the burden of proof on the issue of limitations. Under such circumstances, the Federation believes the lower courts clearly erred by failing to dismiss the indictment, as a matter of law, under this Court's controlling decision in *Grunewald v. United States*, 353 U.S. 391, 396-97, 413-15 (1957).

This Court has ruled that "criminal statutes of limitation are to be liberally interpreted in favor of repose". *United States v. Marion*, 404 U.S. 307, 323 n.14 (1971); *United States v. Scharton*, 285 U.S. 518 (1932). In this case, however, the lower courts clearly failed liberally to interpret the five-year statute of limitations in favor of repose. Instead, they erroneously *extended* the period of limitations on the basis of an asserted '*reasonable inference*' for which there is no basis whatsoever in the record(See *Pet.App.* 26a). In fact, as the petition for certiorari emphasizes, even before the cooperative's former employee *withdrew* from the alleged conspiracy when he was removed from his position in May, 1986, *two* of the other *four*

alleged conspirators (Pet and its Virginia manager) had already *totally withdrawn* in 1985. The record further establishes without contradiction that after May, 1986 the cooperative's replacement employee absolutely refused to become involved in the alleged Sherman Act violation.

Consequently, the Federation urges this Court to recognize from the very outset that the terrible injustice inflicted on the dairy cooperative in this case—as well as the several constitutional issues thereby presented—could and should have been avoided by correct, liberal application of the statute of limitations and this Court's decision in *Grunewald*.

Thus, the Federation submits the lower court's rulings in this regard are so clearly erroneous and the correct result so obvious, this Court should summarily reverse the Fourth Circuit's decision and dismiss the indictment under the statute of limitations. *Rule 16.1, Supreme Court Rules*; *Commissioner of Internal Revenue v. Asphalt Prods. Co.*, 482 U.S. 117, 123 (1987); *Colorado v. Connelly*, 474 U.S. 1050 (1986). In the alternative, the Federation submits the petition for certiorari should be summarily granted, the Fourth Circuit's decision vacated, and the case remanded for reconsideration in light of *Grunewald*, *Marion* and *Scharton*, *supra*. See *Lee v. Missouri*, 439 U.S. 461 (1979).

At the very least, the petition for certiorari should be granted and this case reviewed by this Court on the statute of limitations issue.

B. THE DOCTRINE OF UNCONSTITUTIONAL PREINDICTMENT DELAY.

The Federation joins petitioner in its insistence that this case is a typical example of unconstitutional preindictment delay.

The dairy cooperative was vicariously indicted in 1991 for a crime allegedly committed, without the cooperative's knowledge,authorization or approval, in 1984 by a then new employee it subsequently discharged for other reasons in 1986. The employee left in 1986 with all his personal work papers, bid documents, bid computations, correspondence and memoranda, and from that point forward he was both totally inaccessible to the cooperative and actively engaged in working with the prosecutors to get even with the cooperative for his discharge (*Pet.App.* 63a-65a). Accordingly, when the indictment was filed in 1991, the cooperative was essentially defenseless. Its ability to defend against a Sherman Act violation allegedly secretly committed by the hostile former employee in 1984 was nearly nonexistent.

The prosecutors then added insult to injury by unfairly manipulating the hostile employee and successfully opposing every effort the cooperative made to interview or depose him, or learn something about the alleged Sherman Act violation for which it was vicariously indicted.

The Federation submits, therefore, that the record fully supports the cooperative's contention that it was *severely prejudiced by the government's extraordinarily lengthy preindictment delay*. Its ability to defend itself in this vicarious liability case was destroyed, and it was effectively prevented from determining

whether farmer cooperative exemptions from the antitrust laws under the Capper-Volstead Act, 7 U.S.C. § 291, the Clayton Act, § 6, 15 U.S.C. 17, or the Virginia Antitrust Act, Code of Virginia, § 59.1-9.4(2), precluded its vicarious antitrust liability in this case. See *Dickey v. Florida*, 398 U.S. 30 (1970) (prejudice consisted of loss of key witnesses and documents); *Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990), *cert. denied* 111 S. Ct. 590 (1990) (prejudice involved loss of an alibi witness); *United States v. Richburg*, 478 F.Supp. 535, 539-546 (M.D. Tenn. 1979) (prejudice resulted from lost, discarded notes and important documents); *United States v. Sample*, 565 F.Supp. 1166 (E.D. Va. 1983) (prejudice consisted of the loss of one witness and loss of memory by another witness).

But while petitioner cooperative established that it suffered *fatal prejudice* as a result of the government's extraordinary preindictment delay, *the government offered absolutely no evidence in the record to justify those years of delay*. The district court, in turn, held no evidentiary hearing to determine why the indictment was not filed until 1991. *Consequently, the Fourth Circuit's erroneous preindictment delay holdings in this case are based exclusively on what the government argued in its brief at the appellate level.* As Mr. Justice Stevens wrote in his dissenting opinion in *United States v. Lovasco*, 431 U.S. 783, 799 (1977):

> "Manifestly, [unsworn statements of counsel at the appellate level] cannot be properly considered by us in the disposition of [a] case. . . ."

But, even if the government's arguments on appeal could be considered by this Court as evidence, the

record in this case plainly establishes the obvious fallaciousness of those arguments. The government's main contention was that the lengthy delay of several years was "*investigative delay*" approved by this Court in *United States v. Lovasco*, *supra* (Govt.'s 4th Cir. brief, pp. 13-15). In order to make that baseless argument, the government distorted the true facts in its appellate brief, as follows (at p. 14):

> "First, the earlier [1986-88] investigation centered on allegations of bid rigging on military milk contracts, *not* school contracts . . . Second, that investigation did not involve a participating member of the conspiracy, Pet Dairy. . . ."

But the Department of Justice's letter of August 28, 1991, which contains the limited, misleading *Brady* material divulged by the prosecutors in this case, proves that argument is false (*Pet.App.* 66a). The Department's letter unqualifiedly states that, *during the 1986-1988 investigation*—

> "Charles Elliott [the cooperative's hostile former employee] stated he had no basis to believe there had been collusion on *school bids*." (Italics supplied.)

And, in a closely-related criminal case in the same district court—*United States v. Hughes*, Cr.No. 92-25-N—one of the prosecutors in the 1986-88 investigation testified as a witness for the government as follows (*Pet.App.* 77a):

> "However, from the get go [in 1986] school bids were included and were a focus . . . in [the] bid-rigging investigation. . . ."

Indeed, the indictment in *Hughes* demonstrates that Mr. Hughes was indicted for alleged perjury during the 1986-88 investigation regarding his dairy's (Birtcherd Dairy's) purported collusion with *Pet Dairy* on *school contracts—not* military contracts. Thus, contrary to the government's unsworn arguments on appeal in this case, Pet Dairy was clearly involved in the 1986-88 investigation.

Stripped of the government's inaccurate, self-serving appellate arguments, therefore, the record establishes that this is what actually occurred: In 1986, the cooperative's disgruntled former employee concocted a series of criminal charges against the cooperative and the employee who replaced him after the discharge, brought them to the prosecutors and urged them to indict the cooperative and the replacement employee (*Pet.App.* 63a-65a). The prosecutors conducted a grand jury investigation *involving both military and school contracts* (*Pet.App.* 63a-66a). On January 27, 1988, however, they wrote a memorandum which recommended that the investigation be closed (*Pet.App.* 65a). That memorandum stated (*Pet.App.* 64a-65a):

> "There are several problems with Elliott's proffer. First, Elliott recently was fired from Marva Maid and has a clear axe to grind against both the company and Mr. Neale. More significantly, however, we have been unable to obtain any corroboration of Elliott's allegations of bid-rigging. . .
>
> "In sum, with the exception of Elliott's allegations, we have no proof of bid-rigging or any other antitrust violations. Since we see

> no other avenues of inquiry at this time, we recommend closing the investigation."

Having "*closed the investigation*" in January, 1988, the prosecutors turned their attention to other matters. After more than $3^1/_2$ years of additional unconstitutional preindictment delay, they decided to reopen the case and indict the cooperative on July 30, 1991. As the district court in Virginia stated in *United States v. Sample, supra,* at 565 F.Supp. 1183-84:

> "It is . . . uncontradicted that from April, 1980 through February, 1982, the government conducted no further investigation into the case, and therefore the safe harbor of investigative delay established by *Lovasco* is unavailable to the government for this period of time. . .
>
> "The Court finds, then, that the government's preindictment delay from April, 1980 to December, 1982 was not justified. When balanced against the actual substantial prejudice to defendants caused by the government's delay, the Court finds that defendant's rights to due process have been impaired."

And, as the district court in Tennessee ruled in *United States v. Richburg, supra,* at 478 F.Supp. 545, 546:

> "Placing defendants upon the "back burner" for two years while the government pursued more pressing matters does not constitute an ongoing investigation of those defendants. . .
>
> "Since it does not appear that the delay in indicting movants was either necessary or

> justified for any reason, the court believes that to compel movants who have established actual prejudice to their defense to stand trial at this late date would violate fundamental conceptions of justice and fair play and thereby run afoul of the due process clause of the Fifth Amendment. The court thus will grant the motions to dismiss the indictment. . . ."

Accordingly, for the same reasons as those expressed *supra* with reference to the statute of limitations, the Federation urges this Court to grant the petition for certiorari, vacate the Fourth Circuit's decision and, by one appropriate procedure or another, direct that the indictment be dismissed under Rule 16.1 of the Supreme Court Rules. In the alternative, this issue also should be reviewed by this Court after further briefing and argument.

II

THE PROSECUTORS' SUPPRESSION OF CRITICALLY IMPORTANT IMPEACHMENT AND CREDIBILITY EVIDENCE, WHICH COULD HAVE HAD A PROFOUND IMPACT ON THE OUTCOME OF THIS CASE, VIOLATED THE COOPERATIVE'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS.

In the interest of brevity, the Federation defers to and incorporates herein by reference the facts and arguments contained in the petition for certiorari regarding this vitally important constitutional issue. The Federation wishes to add, however, that in its recent critique of the American system of justice, entitled "The Appearance of Justice", the Washington Post repeatedly referred to the growing tendency of fed-

eral prosecutors to withhold and suppress exculpatory, impeachment or credibility evidence which the Fifth Amendment heretofore required them to disclose to defendants upon request. Thus, this is an issue of important national interest which this Court should clarify in this case.

The Federation submits that in this vicarious liability litigation, the government—which (a) subjected the cooperative to extraordinarily lengthy, exceedingly prejudicial preindictment delay, (b) withheld the discharged employee from any appearance before the grand jury which indicted the cooperative, and (c) bitterly opposed each and every action the cooperative took to interview or depose the otherwise inaccessible employee prior to trial—had a *special duty* to disclose whatever *impeachment* or *credibility* evidence it held regarding the employee for whose stale, antiquated crime the cooperative was finally indicted. See *United States v. Agurs*, 427 U.S. 97, 107 (1976). The prosecutors were particularly obliged to disclose that the former employee had a personal interest in the outcome of this case—that shortly after his discharge, he approached the prosecutors and sought the cooperative's indictment on a series of criminal antitrust charges he personally concocted. See *Giglio v. United States*, 405 U.S. 150 (1972). And, when the prosecutors subjected the employee to more than 90 hours of intensive interrogation just before they finally indicted the cooperative in 1991, they had a special duty to disclose what statements the employee made to cause the prosecutors to decide to indict. *United States v. Bagley*, 473 U.S. 667, 675 (1985).

But, the prosecutors literally disclosed nothing. They withheld part of the critical *impeachment* or

credibility evidence until *after* the cooperative was convicted and sentenced (*Pet.App.* 63a-65a). The remainder they continue to suppress in this case, while they heretofore voluntarily produced it in a related case wherein another defendant was acquitted (*United States v. Hughes, supra*).

Under these compelling circumstances, the lower courts' failure to follow controlling decisions of this Court in *Brady, Agurs, Giglio* and *Bagley* also merits summary reversal under Rule 16.1. Other courts in the federal system have ruled that deliberate suppression of critical evidence, in violation of a defendant's constitutional rights, requires summary reversal. See *United States v. Tincher*, 907 F.2d 600 (6th Cir. 1990); *United States v. Knowles*, 594 F.2d 753 (9th Cir. 1979); *United States v. Beasley*, 576 F.2d 626 (5th Cir. 1978), *cert. denied* 440 U.S. 947 (1978). Again, however, at the very least, the petition for certiorari should be granted and this case reviewed after briefing and argument.

III

THE HYPER-TECHNICAL MAIL FRAUD COUNTS SHOULD BE DISMISSED UNDER THIS COURT'S DECISION IN McNALLY V. UNITED STATES

The Federation also defers to the petition for certiorari with reference to this issue, but with two brief comments. In this case, the cooperative was indicted for allegedly violating the Mail Fraud Statute, 18 U.S.C. § 1341, by simply receiving in the mail two checks from the City of Newport News in payment for milk sold and delivered in the regular course of business. The checks were mailed in September, 1986 and March, 1987—long after the employee in this case

was removed from his position of employment with the cooperative. There is absolutely no proof the cooperative continued to violate the Sherman Act after he was removed. On the basis of this record, the two mail fraud counts clearly should have been dismissed on the merits by the courts below.

In addition, however, there is no evidence in the record to prove that Newport News suffered any economic harm in this case, or that either the cooperative or the former employee intended to cause such economic harm. In fact, at the trial, the discharged employee insisted he never intended to defraud Newport News or to subject the city or its schools to any such harm (JA 421).

Here, too, therefore, the Federation urges this Court to grant the petition for certiorari and reverse the Fourth Circuit's decision on the ground it fails to follow this Court's controlling decision in *McNally v. United States*, 483 U.S. 350 (1987). In *McNally*, Mr. Justice White, writing for the Court, stated, at 483 U.S. 350, 360:

> "As the Court said in a mail fraud case many years ago: 'There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." *Fasulo v. United States*, 272 U.S. 620, 629 (1926). Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights."

As the petition for certiorari demonstrates, Congress thereafter enacted 18 U.S.C, § 1346 in 1988. But, this case was concededly governed by *McNally*; and under *McNally*, the two mail fraud counts should have been dismissed. Here, too, summary resolution under Rule 16.1 seems appropriate. Otherwise the petition should be granted and the case scheduled for further argument.

IV

THE FINE IMPOSED ON THE COOPERATIVE AND ITS INNOCENT FARMER MEMBERS WAS VIOLATIVE OF THE FIFTH AND EIGHTH AMENDMENTS, THE CRIMINAL FINES ENFORCEMENT ACT, AND IT WAS AN ABUSE OF DISCRETION BY THE DISTRICT COURT.

Excessive fines are prohibited by both the Eighth Amendment and the Criminal Fines Enforcement Act, 18 U.S.C. § 3622. Sentencing procedures must also comport with due process requirements of the Fifth Amendment. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). Fines are thus reviewable on both constitutional grounds,and for a court's abuse of discretion under 18 U.S.C. § 3622. *United States v. Harvey*, 885 F.2d 181 (4th Cir. 1989).

In this case, the cooperative was fined $1,100,000 for its former employee's violations of the Sherman Act and the Mail Fraud Statute, 18 U.S.C. §1341. The cooperative had no previous conviction for the violation of any criminal statute, and in the final analysis, the excessive fine imposed on the cooperative will have to be paid by its innocent farmer members, many of whom were not even members of the co-

operative when the employee allegedly violated the Sherman Act.

In addition to the $1,100,000 fine, the cooperative, upon conviction, was automatically suspended as a defense contractor. It thereby lost approximately $10,000,000 in federal military milk sales. It was then sued for treble damages in a civil antitrust action filed by the Commonwealth of Virginia. In that suit, the cooperative and its farmer members were required to pay another $1,050,000 to Virginia schools irrespective of the fact Virginia schools always profited significantly on milk purchased from the cooperative. These staggering losses were imposed although the record in this case establishes the employee's alleged Sherman Act violation did *not* result, and it was *not* intended to result, in either *increased prices* for the Virginia schools or *increased profits* for the cooperative. This, of course, is bizarre, because as the Ninth Circuit stated in another vicarious liability case, *United States v. Hilton Hotels Corporation*, 467 F.2d 1000, 1006, (9th Cir. 1972), *cert. denied* 409 U.S. 1125: "Sherman Act violations are commercial offenses. They are usually motivated by a desire to enhance profits."

This Court has recognized, in a different context, that farmers normally occupy "a particularly harsh economic position". *National Broiler Marketing Association v. United States*, 436 U.S. 816, 825 (1978). "They are subject to the vagaries of market conditions that plague agriculture generally, and they [have] no means individually of responding to those conditions." *National Broiler*, at 825. "Farmers . . . [are] caught in the hands of processors and distributors who, because of their position in the market and their

relative economic strength, [are] able to take from the farmer a good share of whatever profits might be available from agricultural production." *National Broiler*, at 825. This Court's findings in *National Broiler* are appropriate here to demonstrate quite clearly that the excessive, oppressive fine and penalties imposed on the cooperative in this case, but which have to paid by its individual farmer members, will have a devastating impact on those individual farmers.

In this regard, too, the Federation urges this Court to grant the petition for certiorari and remedy the excessive fine imposed on the cooperative and its members. In this case, the lower courts obviously acted without any reference to or consideration of the other crushing penalties that would automatically follow.

Respectfully Submitted:

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Supreme Court, U.S.
FILED
FEB 25 1993
OFFICE OF THE CLERK

No. 92-1085

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MARYLAND AND VIRGINIA MILK PRODUCERS COOPERATIVE ASSOCIATION, INC.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

PETITIONER'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION

STATEMENT

In a vicarious liability criminal case of this nature, justice surely demands that the critical facts be fairly and squarely placed before this Court so the legal and constitutional issues presented can be correctly considered and decided. Petitioner respectfully submits that the government's brief in opposition fails in this regard. It distorts some of the most crucial facts and issues and thereby threatens to perpetuate the terrible injustice inflicted on the cooperative and its members by the erroneous decisions below.

I

THERE IS ABSOLUTELY NO BASIS FOR THE GOVERNMENT'S CONTENTION THAT "THE SHERMAN ACT CONSPIRACY CONTINUED UNTIL THE SUMMER OF 1987". THE ALLEGED CONSPIRACY PATENTLY ENDED IN MAY, 1986 WHEN THE COOPERATIVE REMOVED ELLIOTT FROM HIS POSITION. THE INDICTMENT IS THUS BARRED BY LIMITATIONS.

The petition for certiorari demonstrates that, *by May, 1986,* three of the four alleged conspirators had completely withdrawn, and the conspiracy thereupon terminated (*Petition,* pp. 24-25). *The government itself established through Elliott's own testimony that the cooperative removed him from his management position in May, 1986* (JA 352-53). Now, the government attempts to avoid the impact of the statute of limitations by erroneously asserting in its brief that Elliott served as "manager of petitioner's Marva Maid division. . .to December, 1986" (*Govt's. brief,* pp. 3,

12). The government's brief is clearly contrary to the sworn record and patently wrong.

The government next seeks to evade the statute of limitations by contending that, prior to his removal in May, 1986, "Elliott and Stamper confirmed their agreement for the 1986-1987 school year" (*Govt's. brief*, p. 12). *But at the trial, Elliott could not recall any 1986 reconfirmation agreement with Stamper* (JA 344; 350-54; 409-15). *Stamper, in turn, testified he could not "remember the contents or details" of any 1986 meeting or agreement with Elliott* (JA 186).

In any event, since Elliott was removed from his management position in May, 1986, he was powerless to execute any alleged reconfirmation agreement for the 1986-87 school year. First, he was removed before the cooperative bid on most milk supply contracts for that school year. Second, he had no involvement whatsoever in school milk deliveries and payments for milk during that school year which did not begin until the Fall of 1986, long after his removal.

Faced with these undeniable facts which establish beyond peradventure that the indictment herein is barred by the five-year statute of limitations, the government—like the Fourth Circuit—baselessly infers in its brief that possibly Mr. Neale, Elliott's successor, "continued petitioner's involvement in the conspiracy after Elliott's departure" (*Govt's. brief*, p. 12). But, as the Fourth Circuit found, Neale flatly denied any such complicity (*Pet.App.* 26a). And, Stamper, in turn, testified under oath in this case that, after Elliott was removed from his position, Neale refused to become involved. According to Stamper: "He absolutely didn't want anything to do with prices," and he sim-

ply refused to discuss school milk bids. (*Reply Brief App.*, pp.79a; 82a).

Finally, it is truly ludicrous for the government to contend that the alleged bid-rigging conspiracy continued after mid-1986, at which time the prosecutors herein commenced a massive grand jury bid-rigging investigation in Norfolk (*Reply Brief App.*, pp. 84a-87a). All of the cooperative's bid records and documents were subpoenaed, and several of its employees were summoned to testify (Id.). Even a hardened criminal would not engage in an illegal conspiracy in that kind of atmosphere! Unsurprisingly therefore, there is not a scintilla of evidence that the normally law-abiding cooperative—with Elliott removed from his position as aforesaid—did so in this case.

On this record, petitioner urges this Court to follow its decision in *Grunewald v. United States*, 353 U.S. 391, 406, 415 (1957) and rule (a) that the government failed to carry its burden of proof on the limitations issue, (b) that this prosecution is barred by the five-year statute of limitations, and (c) that the district court, *over petitioner's repeated objections*, failed correctly to charge the jury regarding the statute of limitations issue (See JA 664-70). In this regard, it is settled: "[C]riminal statutes of limitation are to be liberally interpreted in favor of repose." *United States v. Marion*, 404 U.S. 307, 323 n.14 (1971); *United States v. Scharton*, 285 U.S. 518 (1932). The indictment herein should thus be dismissed.

II

EQUALLY SPECIOUS IS THE GOVERNMENT'S CONTENTION THAT IT DID NOT ENGAGE IN EXTRAORDINARY, UNCONSTITUTIONAL PREINDICTMENT DELAY.

Stale claims have never been favored by the law, and far less in criminal cases." *Dickey v. Florida*, 398 U.S. 30, 37 (1970). As reemphasized in I *supra*, the indictment in this case was actually barred by the statute of limitations, which is the primary guarantee against the prosecution of stale criminal charges. *United States v. Ewell*, 383 U.S. 118, 122 (1966); *United States v. Marion*, 404 U.S. 307, 322-23 (1971). The government's brief, however, reinforces petitioner's claim that the indictment also should have been dismissed for unconstitutional preindictment delay.

The government, which waited—(1) more than seven years after Elliott's alleged basic Sherman Act violation in 1984 and (2) more than four years after the disgruntled Elliott came to the prosecutors in April, 1987 and volunteered a series of bid-rigging charges—to indict the cooperative on July 30, 1991, now speciously contends that the prosecutors "*diligently prosecuted the case*," but they were "*hampered by the initial false denials of any bid-rigging on the part of Elliott.*" Thus, the government alleges in its brief that *the prosecutors had to wait more than four years for "Elliott's 180-degree turn" before they could indict the cooperative.* (*Govt's. Brief*, pp. 5-6; 8).

The government's contention is truly incredible. Indeed, the prosecutors' own memorandum of January 27, 1988 demonstrates that this belated contention is

baseless (*Pet.App.* 63a-65a). Elliott was fully available to the prosecutors in 1987; he was entirely cooperative; he proffered bid-rigging charges against the cooperative in an effort to gain the cooperative's indictment; he wanted to get even with both the cooperative and his successor, Neale, for his discharge; and he identified several witnesses who would allegedly support his testimony (*Pet.App.* 64a). *The prosecutors responded by "closing the investigation" in January 1988* (*Pet.App.* 65a).

The government thereupon put the cooperative "on the back burner" for $3^1/_2$ years. The prosecutors literally did nothing to investigate or prosecute until 1991 when they apparently revisited Elliott and decided to indict even though the statute of limitations had expired. *As a result, the cooperative—indicted for crimes Elliott allegedly committed years ago—was left to defend itself without Elliott (who was working with the government), without Elliott's personal bid computations, bid memoranda, correspondence, etc., and without its own bid files which were innocently discarded after the prosecutors closed the aforesaid investigation in 1988.* Under these circumstances, the indictment must be dismissed for unconstitutional preindictment delay. *Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990), *cert. denied* 111 S.Ct. 590 (1990); *United States v. Richburg*, 478 F.Supp. 535 (M.D.Tenn. 1978); *United States v. Sample*, 565 F.Supp. 1166 (E.D. Va. 1983).

III

THE GOVERNMENT'S SUPPRESSION OF IMPEACHMENT AND CREDIBILITY EVIDENCE REGARDING ELLIOTT'S PERSONAL STAKE IN THE OUTCOME OF THIS CASE, AND OF THE FACT THAT HE WORKED CLOSELY WITH THE PROSECUTORS, DEPRIVED PETITIONER OF A FAIR TRIAL IN THIS VICARIOUS LIABILITY CASE BASED ON ELLIOTT'S OWN ALLEGED CRIMES. THE SUPPRESSION OF THAT EVIDENCE ALSO PREVENTED THE LOWER COURTS FROM CONDUCTING MEANINGFUL IN CAMERA INSPECTIONS OF THE ELLIOTT INTERVIEW NOTES.

The government's brief represents that the prosecutors met their *Brady* obligation by "providing *all* the exculpatory and impeachment evidence [they] possessed" (*Govt's. brief,* p. 6). That statement is untrue. The only *Brady* material the prosecutors produced was their *own* statement that, in April, 1987, Elliott allegedly denied any knowledge of bid-rigging (*Pet.App.* 66a).

But, throughout the trial and the appeal proceedings in the Fourth Circuit, the prosecutors suppressed the additional impeachment and credibility evidence contained in their own memorandum of January 27, 1988 (*Pet.App.* 63a-65a). *They suppressed the fact that Elliott, for whose crimes the cooperative was vicariously convicted, had a personal stake in the outcome of this case, to wit, he wanted to punish the cooperative and his successor, Neale, for his 1986 discharge* (*Pet.App.* 64a). *They suppressed the fact that, instead of flatly denying knowledge of bid-rigging in 1987, Elliott actually proffered a series of alleged bid-rigging charges against the cooperative and Mr. Neale.* (*Pet.App.* 64a). And, they suppressed the fact that

the prosecutors investigated Elliott's 1987 charges against the cooperative and found them to be unsupportable. (*Pet.App.* 64a, 65a). As a result, the Fourth Circuit was misled and erroneously ruled (*Pet.App.* 18a):

> "This is neither a case in which the key government witnesses had a personal stake in the outcome of the litigation which was not disclosed, *see Giglio*, 405 U.S. at 154-55. . .; *Bagley*, 473 U.S. at 683. . ., nor one where the government withheld evidence "so supportive of a claim of innocence that it [gave] the prosecution notice of a duty to produce." *Agurs*, 427 U.S. at 107. This is a case where the government met its obligation under *Brady* by providing all of the exculpatory and impeachment evidence it possessed. . . ."[1]

Furthermore, the prosecutors' suppression of the aforesaid impeachment and credibility evidence plainly prevented the district court and the Fourth Circuit from conducting meaningful, fully intelligent *in camera* inspections of the Elliott interview notes.

Without any knowledge of the fact Elliott had a personal stake in the outcome of this case, and of the fact Elliott was voluntarily working with the prosecutors to gain the cooperative's indictment and conviction for crimes Elliott himself secretly committed,

---

[1] The prosecutors did *not* produce their memorandum of January 27, 1988 in the lower courts in this case. Rather, they produced it in 1992 in a related case, *United States v. Hughes*, wherein the defendant was acquitted. The memorandum was not brought to the Fourth Circuit's attention until *after* it rendered its opinion on September 15, 1992.

how could the lower courts have possibly appreciated or fully understood the true nature and significance of any additional *impeachment* or *credibility* evidence contained in the prosecutors' Elliott interview notes? Moreover, without the suppressed facts now disclosed by the prosecutors' memorandum of January 27, 1988, how could the courts below have possibly correctly analyzed the contents of those notes to determine why, in light of Elliott's proffered cooperation, it was necessary for the prosecutors to interrogate him for more than 90 hours, and to grant him immunity from prosecution on four separate occasions, before he would testify against the cooperative? (*Pet.App.* 63a-65a; 68a-75a).

Consequently, petitioner submits the petition for certiorari should be granted and petitioner's conviction reversed on constitutional grounds in line with this Court's decisions in *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972), *United States v. Agurs*, 427 U.S. 97 (1978) and *United States v. Bagley*, 473 U.S. 667 (1985). In view of the government's admission, at p. 11 n.4 of its brief, that the Elliott interview notes were voluntarily produced by the government without objection in the related case (*United States v. Hughes*) and Mr. Hughes' acquittal in that case, the production of those same notes in this case is obviously long overdue.

At the very least, the petition should be granted to determine what relief is appropriate under the aforesaid circumstances in light of this Court's decision in *Goldberg v. United States*, 425 U.S. 84, 108-111 (1976); *Campbell v. United States*, 373 U.S. 487 (1963) and the Jencks Act, 18 U.S.C. 3500. Petitioner submits that since the suppressed factual information

contained in the prosecutors' memorandum of January 27, 1988 has now been exposed, and since the prosecutors themselves voluntarily produced their Elliott interview notes in *Hughes*, the judgment below should be vacated by this Court, the government should be ordered to release the suppressed notes in this case, and this Court should order a new trial without the necessity for further preliminary proceedings in the courts below (See *Goldberg*, at pp. 111, 112; *Clancy v. United States*, 365 U.S. 312 (1961)).

IV

THE FINE IMPOSED ON THE COOPERATIVE WAS EXCESSIVE, AN ABUSE OF THE LOWER COURTS' DISCRETION, AND VIOLATIVE OF PETITIONER'S RIGHTS UNDER THE FIFTH AND EIGHTH AMENDMENTS.

At p. 7, n.1 of its brief, the government suggests that the "propriety of the sentence" in this case is possibly of no further interest to the cooperative and its farmer members. That suggestion is plainly incorrect.

The cooperative, a first offender with no prior criminal record, was fined $1,100,000 for Elliott's offenses by the district court. As a result of the conviction, it was automatically suspended as a government contractor and lost approximately $10,000,000 in federal military milk sales. The cooperative was thereupon subjected to further crushing losses in a follow-up treble-damage civil antitrust action filed by the Attorney General of Virginia in the same district court in Norfolk. The Attorney General contended that, under Section 5 of the Clayton Antitrust Act, as amended, 15 U.S.C. 16(a), the final judgment in this

criminal antitrust case is *prima facie* evidence of the cooperative's liability in her follow-up civil action. These multiple losses, of course, must be borne by the cooperative's completely innocent farmer members, many of whom were either not members when Elliott committed the alleged Sherman Act violation or are not presently members of the cooperative today. This, of course, is an additional reason why correct application of the statute of limitations and/or the doctrine of preindictment delay is so imperative in this vicarious liability criminal case.

Space limitations make it impossible for petitioner to discuss all of the legal and constitutional reasons why the fine and related losses imposed on the cooperative and its members in this case should be reviewed and set aside. Thus, petitioner directs the Court's attention to the discussions of those issues contained in the amicus curiae briefs filed herein by the National Council of Farmer Cooperatives and the National Milk Producers Federation.

CONCLUSION

Petitioner reiterates that the petition for a writ of certiorari herein should be granted.

Respectfully Submitted:

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Counsel of Record for Petitioner

February 25, 1993

APPENDIX

REPLY BRIEF APPENDIX
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Excerpt from testimony of Douglas H. Stamper on January 29, 1991 before the grand jury in this case sitting in the United States District Court for the Eastern District of Virginia (Norfolk Div.) 79a,80a

Excerpt from testimony of Douglas H. Stamper on April 29, 1992 in the closely-related case, *Commonwealth of Virginia by its Attorney General, etc. v. Land-O-Sun Dairies, Inc. et al.*, C/A No. 91-510-N, U.S. District Court for the Eastern District of Virginia (Norfolk Division) 81a-83a

Prosecutors' covering letter and *subpoena duces tecum* of July 14, 1986 addressed to petitioner, Maryland and Virginia Milk Producers Cooperative Association, Inc., in grand jury investigation conducted by the prosecutors in the United States District Court for the Eastern District of Virginia (Norfolk Division) 84a-87a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

UNITED STATES OF AMERICA
v.
JOHN DOE

TESTIMONY OF DOUGLAS H. STAMPER

Norfolk, Virginia
January 29, 1991

Before:

THE UNITED STATES GRAND JURY

Appearances:

DAVID C. JORDAN, ESQUIRE
PHILIP J. BURI, ESQUIRE
United States Department of Justice,
Antitrust Division

* * *

[66] A. Yes, sir, in Newport News. Again, I'm not sure if that's Newport News or Hampton. But it's on Jefferson Avenue.

And we met—it seems like it may have been the afternoon—I can't be sure if it was morning or afternoon—but for coffee and talked about his coming back and Charles being gone, and I do recall that he made the statement that he absolutely didn't want anything to do with pricing.

Q. Is it your best recollection that Mr. Elliott was gone at the time that this meeting occurred, he had already left the company?

A. The way I recall it, Elliott was already gone.

Q. And at that time do you recall whether you were aware of the antitrust investigation that was going on in the milk industry at that time?

A. Yes. I was aware of it.

Q. Was there any reference made to that investigation that you can remember?

A. I don't recall. I cannot say there wasn't. But I don't recall us discussing it.

Q. Did you interpret—did you

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CIVIL ACTION NO. 91-510-N

COMMONWEALTH OF VIRGINIA,
by its Attorney General, etc.,

Plaintiff,

V.

LAND-O-SUN DAIRIES, INC.,
MAOLA MILK & ICE CREAM COMPANY, INC.,
THE SOUTHLAND CORPORATION,
MARYLAND AND VIRGINIA MILK PRODUCERS
COOPERATIVE ASSOCIATION, INC.,
t/a MARVA MAID DAIRY,

Defendants.

DEPOSITION UPON ORAL EXAMINATION
OF DOUGLAS HOWARD STAMPER,
TAKEN ON BEHALF OF THE DEFENDANTS

Virginia Beach, Virginia
April 29, 1992
VOLUME I

Appearances:

MILTON A. MARQUIS, ESQUIRE
DAVID B. IRVIN, ESQUIRE
Assistant Attorneys General
Counsel for the Plaintiff

* * *

[62] a conversation with Thomas Neale of Marva Maid?

A. Yes, sir.

Q. Was that after Mr. Elliott had been demoted by Marva Maid?

A. Again, I really didn't know he was demoted. I took it to be after he was gone, but I don't know.

Q. Let me ask you this: Do you recall a certain time that Mr. Elliott was no longer responsible for school bids for Marva Maid, that Mr. Neale had taken that responsibility?

A. Yes.

Q. And during this time, you don't know whether Mr. Elliott had been discharged and was gone from Marva Maid, or merely had been demoted and was still at Marva Maid but just not dealing with the schools anymore, you don't know which; is that right?

A. I don't know. Like I said, I had the impression that he was gone, but I don't know.

Q. When you had a meeting with Mr. Neale did he tell you at that meeting he did not want to discuss anything about school milk prices?

A. Any pricing.

Q. Any prices?

A. Any prices.

Q. So I take it you—at that meeting you [63] didn't come to any agreement with Mr. Neale about anything about school milk bids, did you?

A. No, sir.

Q. At that meeting did you try to talk to Mr. Neale about prices?

A. No, sir.

Q. He just announced to you, "Look, I don't want to talk about prices"; is that right?

A. That's the way I remember it.

Q. What was the meeting about with Mr. Neale?

A. As I recall, he called me and wanted to meet with me, that they were having some management changes, that's the reason I think it was when Elliott left and that he was in charge then.

Q. He just wanted to let you know that Mr. Elliott was leaving?

A. That's the way I remember it.

Q. That's the substance of the meeting?

A. Yes, sir. And that he was back in operation, the way I understood it, that Mr. Neale had left or was temporarily out of the picture, to some degree anyway.

Q. More or less a professional courtesy type of a call?

A. Well, I didn't know he knew that, but I knew

* * *

U.S. Department of Justice
Antitrust Division
Office of the Deputy Assistant Attorney General *Washington, D.C. 20530*

AVN:GK
60-9-272

July 14, 1986

Maryland & Virginia Milk Producers
Cooperative Association, Inc.
Marva Maid Division
P.O. Box 5145
Newport News, VA 23605-0145

Re: Grand Jury Investigation—Milk—
Eastern District of Virginia, Norfolk

Dear Sir or Madam:

Pursuant to a grand jury investigation into possible criminal violations of federal antitrust laws, your company is required to furnish all documents responsive to the enclosed subpoena. As stated in this subpoena, compliance is scheduled for August 13, 1986, before a grand jury sitting in Norfolk, Virginia. Your company's custodian should be prepared at that time to testify as to the identity of the documents produced and the persons who conducted the search, the extent of the search, and the identity and location of the files from where the documents were retrieved.

In lieu of personally producing documents before the grand jury, the company may, at its option, comply with the subpoena by sending the documents to the Antitrust Division's offices in Washington, D.C. If the company elects to comply by mail, it must follow the procedure set forth below:

(1) The officer responsible for complying with the subpoena must execute the enclosed affidavit before a notary public. This affidavit must accompany the documents being forwarded.

(2) An index, list or other summary identifying the documents produced, who conducted the search, the files searched, and the files from where the documents were retrieved also must accompany the documents.

(3) The documents must be forwarded to the undersigned at the following address on or before August 13, 1986, the return date of the subpoena:

Gail Kursh, Esquire
U.S. Department of Justice
Antitrust Division, Room 3237
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Please advise me on or before August 8, 1986, if the company elects to produce the documents personally so that suitable arrangements can be made with the grand jury. You may contact me at (202) 633-2495.

Thank you for your cooperation.

Sincerely yours,

/s/ Gail Kursh
Gail Kursh
Attorney
Antitrust Division

Enclosure

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

John Doe #86-044

SUBPOENA TO TESTIFY BEFORE GRAND JURY

To: Maryland & Virginia Milk Producers
Cooperative Association, Inc.
Marva Maid Division
P.O. Box 5145
Newport News, VA 23605-0145

☐ Person
■ Document or Object

YOU ARE HEREBY COMMANDED to appear in the United States District Court at the location, date, and time specified below to testify before the Grand Jury in the above entitled case.

Place: Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, VA 23510

Date and Time: August 13, 1986, 9:30 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):[1]

See attached schedule

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

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[1] If not applicable, enter "none."

Clerk

G. Ray Old, Acting Clerk

(By) Deputy Clerk

Margaret C. Clifford

Date

July 16, 1986

This subpoena is issued on application of the United States of America by:

Gail Kursh

/s/ Gail Kursh

Name, Address and Phone Number of Assistant U.S. Attorney

Gail Kursh, Attorney
U.S. Department of Justice, Rm. 3237
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
(202) 633-2495